TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 448

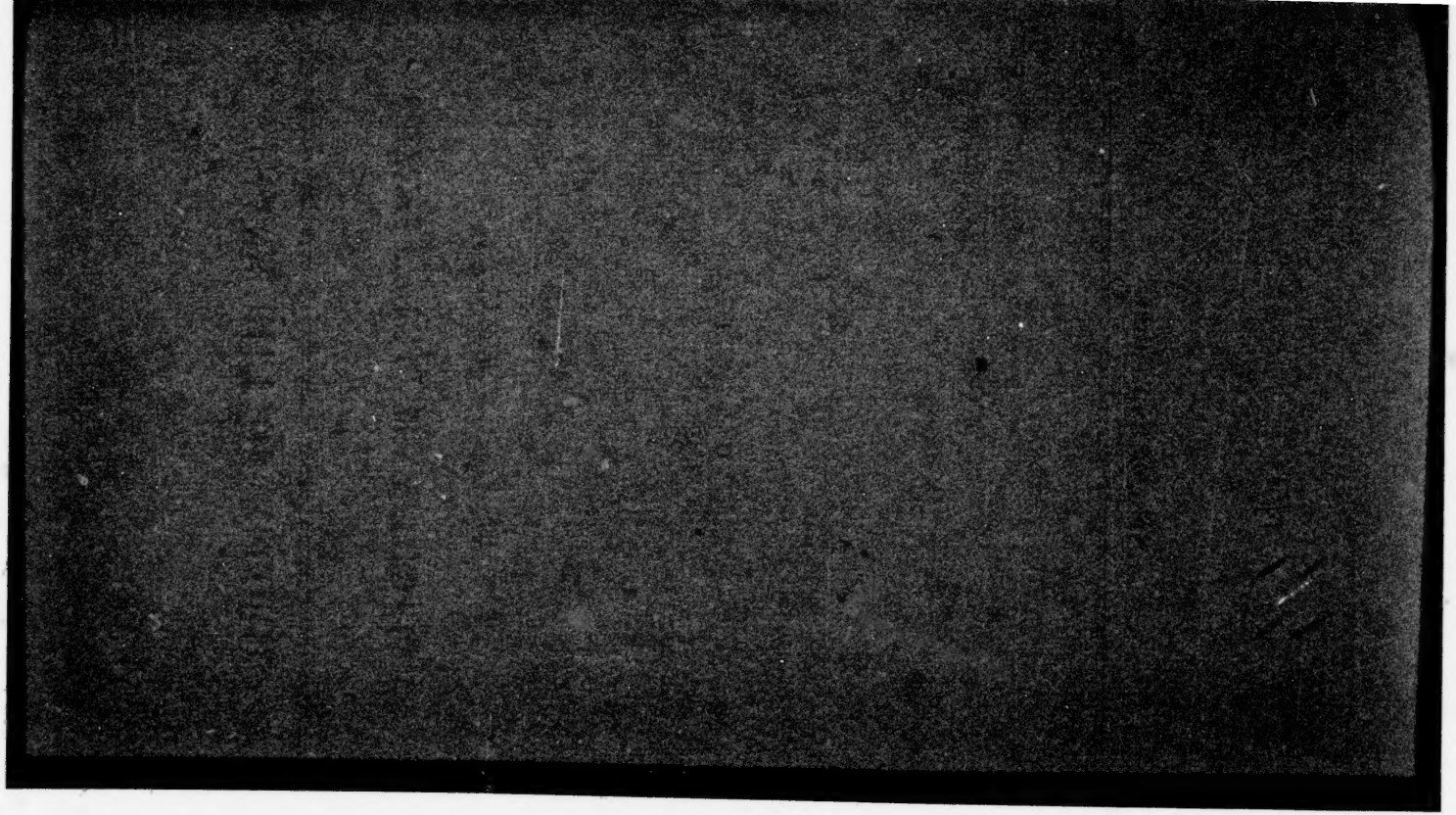
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

THE MOBRIDGE-ATHELL-MEYER CONSOLIDATED COAL AND COKE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JANUARY 31, 1925.



(21,245.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 449.

LOUIS KNOP AND JOSEPH L. ROCK, INDIVIDUALLY AND AS GAUGERS OF COAL AND COKE, APPELLANTS,

vs.

THE MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 18, 1908.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

No. 13437.

THE MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY, Appellee,
versus
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal and Coke, Appellants.

Hon. Walter Guion, Attorney General of Louisiana, and E. H. McCaleb, Jr., Esquire, for Appellants; Rice & Montgomery, Esquires, for Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana, New Orleans Division, to the Supreme Court of the United States, Returnable within Thirty (30) Days from the Thirteenth (13th) Day of June, A. D. 1908, at the City of Washington, District of Columbia.

TRANSCRIPT OF APPEAL.

1 *Bill of Complaint. Filed December* 10, 1906.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE CO.
vs.
LOUIS KNOP & JOSEPH L. ROCK, Individually and as Gaugers of Coal & Coke.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Louisiana:

The Monongahela River Consolidated Coal & Coke Company, a corporation organized under the laws of the State of Pennsylvania a citizen of said State, having its principal domicile in Pittsburg, in said State, of which corporation Francis L. Robbins, a resident in and citizen of said State, is President, brings this its bill of complaint against Louis Knop and Joseph L. Rock, both citizens of the State of Louisiana, and residing in the City of New Orleans, in the State and District aforesaid, acting as Gaugers of coal and C Coke in the State of Louisiana by appointment of the Governor of Louisiana, and, thereupon your orator complains and says:

First. That your orator is organized under the laws of the State of Pennsylvania and is a citizen of and has its principal domicile in said State; and is engaged both in domestic commerce in said State, and in commerce with other states of the United States, including the State of Louisiana.

Second. That your orator is engaged in mining bituminous coal in the State of Pennsylvania and elsewhere, but not in the State of Louisiana, for the purpose of using, consuming and selling same so mined, or otherwise owned by your orator, in said States, where mined, and in transporting Coal so mined or owned to other States of the United States, including the State of Louisiana, there to be used and consumed or sold for use and consumption.

Third. That the Coal so transported to the State of Louisiana is loaded, at place of its mining or shipment, either upon Coal Boats having a usual measurement of from 160 to 170 feet in length, about 26 feet in width and a depth of say 9 to 10 feet, and having an average capacity of from say 9000 to 10000 barrels of Coal, or in weight from say 900 to 1000 tons;—or upon barges having a cubic or weight capacity say one half or somewhat less than one half of the Coal Boats described, as above.

Fourth. That the transportation of such coal to the State of Louisiana is by way of the Ohio and Mississippi Rivers: that from say twenty to fifty coal Boats or barges more or less, loaded with coal, are combined into a single tow, and each combination so made up, is towed down said rivers by suitable Steam towing vessels to its destination, to wit: In Louisiana, to Bayou Sara, Baton Rouge and New Orleans, as the case may be, convenient for use or the requirements of commerce, and are there moved along or against the banks of the *M* Mississippi River, where they are protected and cared for, until sold or otherwise disposed of.

Fifth. Your orator further complaining says that it has been engaged for say seven years or more, last past, in mining and transporting Coal, as set forth herein, and during said period has transported to and into the State of Louisiana, for use, consumption or sale, a yearly average of say 800 to 1000 loaded boats and Barges.

Sixth. And your orator further complaining, says: That prior to the past two or three years, the Coal so transported to the State of Louisiana, was, to the extent of say one half or more thereof, sold and delivered to planters for use and consumption by them especially upon sugar plantations, and that such sales were usually by the Coal Boat or Barge Load, that is, in unbroken packages; but that, in consequence of the introduction and general use of fuel oil by very many of such planters on their plantations, the demand for and sales for such consumption and use has been greatly reduced and has not exceeded during the year last past, nor is it likely for the year to come, to exceed 35 or 40 unbroken packages—that is boat or barge loads.

That your orator, also sells and delivers in unbroken packages, that is, to certain dealers in Pittsburg Coal, in and in the neighborhood of the City of New Orleans, by the boat load or barge load, an average amount of not exceeding say 125 Coal Boat or Barge loads per year, and it is fair to anticipate that your orator will continue to so sell and deliver Pittsburg Coal in such Coal Boat or Barge lots or unbroken packages, for the period of the next and other years ensuing.

That by far the principal sales and dispositions of the Coal
3 so transported by your orator to and into the State of Louisiana, is by the barrel or by weight, in broken packages, or wholly without relation to the amount, in measure or weight of such coal in such packages of Boats or Barges, whether broken or unbroken, which measurement or weight is fixed and determined by actual measurement or weighing at the time of delivery to the purchaser, that the ascertainment of the cubic or weight contents of such entire package is of no use or guide or value, or benefit, to either your orator or to the person or persons to whom such coal is sold and delivered,—and serves neither to protect him nor them, nor your orator, nor any other purpose whatsoever:

That your orator, for its own uses and business in Louisiana, uses and consumes annually Sixteen Boat Loads, more or less or their equivalent, of the coal, so by it transported to Louisiana.

Seventh. And your orator further complains and says that by a certain Act of the General Assembly of the State of Louisiana, entitled "An Act for the appointment of two Coal and Coke Boat Gaugers, to fix their compensation and to define their duties, "Approved July 12, 1888, it was purported to enact, amongst other things, to-wit; By section 1 thereof that there should be appointed by the Governor, by and with the advice and consent of the Senate, two Coal and Coke Boat Gaugers, who should have their offices in the City of New Orleans; that each of said Gaugers should give bond, with security, in the penal sum of five thousand Dollars, for the faithful performance of the duties required of him by law; that it should be the duty of said Gaugers when called upon for that purpose, to gauge any coal or coke boat or barge in the port of New Orleans, or State of Louisiana; that such gauging should consist in reducing the length, breadth and depth inside measurement of boats or barges, deducting all obstructions and displacements, into cubic inches, and dividing said cubic inches, by 2688, thus ascertaining the net measurement in bushels,—and that two 6/10 bushels should constitute a barrel.

And said Act purported to further prescribe that, in all cases it
4 should be the duty of said Gaugers, or either of them, to respond promptly to any call made for their or either of their services to furnish a full and detailed certificate of gross measurement of the boat or barge gauged, and the allowance made for obstructions and displacements:

That the fee for gauging or regauging should be ten Dollars ($10) for each boat, and five dollars ($5) for each barge, to be paid by the seller, except as otherwise provided in said Act.

And said Act purported to further enact that no boat load of coal or coke should be sold in this City—meaning the City of New Orleans,—or state, until it had been inspected as provided in said Act; that any person who should sell a boat load of coal or coke that had not been gauged as aforesaid, should be liable to a penalty of Fifty Dollars ($50) for each boat or barge so sold, to be recovered, with costs of suit, in any Court of Competent jurisdiction, for the benefit of the Charity Hospital of New Orleans.

Eighth. And your orator further complains and says that a certain Act No. 137, entitled "An act to compel the weighing or gauging in this State, of all bituminous or anthracite coal or coke sold in Louisiana by boat barge or car load "enacted by the General Assembly of the State of Louisiana, approved July 12, 1894, consisted of three sections reading as follows:

"SECTION 1. That all anthracite or bituminous coal sold in this State under the direction of the Governor by the State Gaugers whose fees, duties and responsibilities shall remain as now fixed by law, provided the fee for weighing shall not exceed one cent per *ton*.

"SECTION 2. Be it further enacted, etc., That the Standard measures for the bituminous and anthracite coal in this State shall be the barrel containing 6988 cubic inches and the Standard *ton* of 2000 pounds.

"SECTION 3. Be it enacted, etc., That whoever shall violate the provisions of this Act shall be adjudged guilty of a misdemeanor and shall be fined not less than $50, *not* more than $100 at the discretion of the Court for each offense."

5 Ninth. That said General Assembly, by Act No. 58, approved June 26th, 1902, enacted an Act entitled "An Act to amend Act No. 137 of the Session of 1894, entitled an Act to compel the weighing or gauging in the State of all bituminous or anthracite coal or Coke sold in Louisiana by boat, barge or car load"—meaning the Act of said General Assembly herein-before last mentioned.

And said Act in the body thereof enacted that Section One of Act 137 of the Session of 1894 be amended and reenacted so as to read as follows:

"That all anthracite or bituminous Coal sold in this State shall be gauged or weighed by the State Coal and Coke Gaugers in the State, whose fees, duties and responsibilities shall remain as now fixed by law, provided the fee for weighing shall not exceed one cent per ton."

That by said amended Act, Sections 2 and 3 of said Act No. 137 of 1894, were not re-enacted.

Tenth. And your orator further complaining says that by a certain Act No. 80 of said General Assembly of Louisiana, approved July 1, 1904, entitled "An Act to amend and re-enact Sections 3, 5 and 8 of an Act entitled "An Act for the appointment of two coal and Coke Gaugers to fix their compensation and to define their duties being Act No. 147, approved July 12th, 1888", and being the Act herein before first referred to, it did purport to amend said Act and enact among other things, (by section one thereof) that it should be the duty of said gaugers to gauge all boats and barges containing coal, whether Anthracite, Bituminous, or Coke, brought into the State of Louisiana, for sale or delivery under sales made out of the State; by section two thereof that the failure to call on said gaugers, or either of them, should not relieve them or either of them, of the obligation to gauge all Coal and Coke boats and Barges as provided by Section one of said amendatory Act—and by section 3 thereof that no boat load of coal or Coke, nor any part

thereof, should be delivered to the purchaser, whether sale thereof was made within or without the State, until it has been inspected as provided in said Amended Act; and that any person, part-
6 nership, firm or corporation selling or delivering, in this State, a boat load or barge load of Coal or Coke, or any part thereof, that has not been gauged as therein provided, or who, within twenty-four hours after the arrival in this State of any boat or barge loaded with Coal or Coke, shall not have notified said Coal Gaugers, or either of them, at their offices in the City of New Orleans, of its arrival in this State requesting that the same be gauged, shall be liable to a penalty of Fifty Dollars for each boat or barge of Coal or Coke, or part thereof, so sold and delivered, and for each boat or barge so arriving in this State of which no notice was given to the said Coal Gaugers, to be recovered with costs of suit, in any Court of Competent jurisdiction for the benefit of said Charity Hospital.

And by said Act all laws and parts of laws in conflict or inconsistent therewith were declared to be repealed.

That by said Act by said repealing, clause, as well as by implication, the said Acts Nos. 137 of 1894 and 58 of 1902, herein-before referred to were and are repealed.

Eleventh. And your orator further complaining says that the aforesaid Act No. 147 of the Session of the General Assembly of 1888 and Act No. 80 of the session of said assembly of 1904, purporting to amend said Act No. 147, and said Acts No. 137 of 1894 and No. 58 of 1902 were and are in violation of Article 29 of the Constitution of Louisiana of 1879, in operation at the passing of said Act No. 147 of 1888, and up to 1898, and of Article 31 of the Constitution of said State of 1898, in operation up to and at the passing of said amendatory Act No. 80 of 1904, which said Articles of said Constitutions of 1879 and 1898, require and ordain that every law enacted by the General Assembly shall embrace but one object and that shall be expressed in its title.

That Acts No. 147 of 1888, No. 80 of 1904; (as well as said Acts No. 137 of 1894, and Act No. 58 of 1902, should the same be considered not to be repealed) are each and all in violation of the Bill of Rights, article 1, enumerated in the Constitution of Louisiana of 1879 declaring that the only legitimate end of government is to protect the citizens in the enjoyment of life, liberty and property, and of Act 1, of the Bill of Rights, enumerated in the Consti-
7 tution of 1898 declaring the only legitimate end of government is to secure justice to all; and each and every of said Acts is in violation of Article 1, Section 8, clause 3 of the Constitution of the United States which ordains that the Congress shall have power to regulate commerce with foreign nations and among the several States, and the Indian tribes.

Twelfth. And your orator further complaining says that, he has at no time assented to the validity or binding force of said Acts or any of them; but that, while the business conditions as herein-before stated were such that the larger part of the transactions and sales of Coal made by your orator in the State of Louisiana, were in unbroken packages, meaning by the Coal Boat or Barge Load, and

at all times denying the validity or binding force of said Acts of any of them, he has, for the time refrained from contesting the same, as, on the part of purchasers and dealers in Coal, by unbroken packages, the Certificates furnished by the Gaugers of coal appointed as aforesaid, were ordinarily accepted as approximately correct as to measurements; but not because of consent to or acquiescence in the validity of any of said Acts; all of which has been at all times well known to the several gaugers of coal and coke appointed and acting as herein-before set forth, but your orator says further that for the gauging of Coal Boats and Barges loaded with Coal, intended by your orator to be disposed of in unbroken packages, he is, for convenience only, still willing to pay for the services of the defendants as heretofore paid by him:

Thirteenth. That the gauging or weighing of Coal transported as herein set forth by your orator to the State of Louisiana, serves neither a useful or beneficial purpose, and the gauging or weighing of the same is of no advantage nor is a protection to either the purchasers thereof or your orator:

Fourteenth. That said Gaugers, Louis Knop and Joseph L. Rock, have been and are accustomed to meet the Coal fleets or tows of your orator as they enter the State and to gauge each and every the Coal Boats and Barges therein, whether or not the same are to be used and consumed by your orator, or are to be sold in
8 broken packages or quantities less than a boat or barge load, or by weight, and to demand of your orator the fees fixed by the so-called Acts aforesaid for so doing—all to the manifest wrong and injury and against the repeated protests of your orator and his agents and they will continue so to gauge the Coal Boats or barges of your orator before the same have arrived at their destination and while yet afloat on their way down the Mississippi River and irrespective of whether the same are to be consumed by your orator, — are to be sold or otherwise disposed of in broken packages or by weight or measure.

That said Acts so set forth herein, are not inspection laws within the meaning of the Constitution of the United States and are invalid and oppressive and deprive your orator of his property without due course of law; that they have never been acted upon as inspection Acts; that Coal from the State of Alabama, which has constantly and is yet constantly arriving in Coal Boats and Barges and in cars by railroad, has never been and is not now held as subject to gauging or to weighing under any of said Acts.

Fifteenth. And your orator further complains and says that he has repeatedly and persistently refused to recognize the validity of said Acts or any of them, and has repeatedly denied the right, or necessity from any standpoint, for the gauging of the coal of your orators because of the invalidity of said Acts of the General Assembly of Louisiana, and because the said Acts were and are not inspection Laws, within the meaning of the Constitution of the United States, and because such gauging served no good or useful purpose on protection to your orator, to the purchaser of Coal, to the State or the public.

Sixteenth. That your orator has paid annually since say the year 1899, to the persons serving as Gaugers appointed under said Act No. 147 of 1888, an average of from $8000 to $10,000 per year, and the defendants, if not restrained by this Honorable Court will continue to demand from your orator sums in the aggregate for the ensuing year and for each year to come as long as the business of your orator shall continue, sums of like aggregate as above mentioned; that your orator's interests in the matter in controversy exceeds $2000, exclusive of interest and costs; and arises under the constitution and laws of the State of Louisiana and of the United States.

Seventeenth. That your orator is of right entitled to have the said several Acts of the General Assembly of the State of Louisiana declared unconstitutional, null, void, and of no force or effect, in respect to the coal of your orator, so as aforesaid transported to the State of Louisiana, whether contained in Boats, Barges or other receptacles or packages.

Eighteenth. That your orator has, at the time of filing this bill of complaint, some two hundred and more boats or barges loaded with coal on their usual way or route in the Ohio and Mississippi Rivers to the State of Louisiana, with several hundred other Boats and Barges of coal to follow, as rapidly as convenient, and that the defendants will proceed to gauge the same and to demand fees for so doing, as hereinafter mentioned, unless restrained from so doing by this Honorable Court.

Nineteenth. That your orator has paid, under the exactions of the Gaugers of Coal mentioned in the caption to this bill of complaint, and to their predecessors in office, sums of money exceeding the average aggregate of $8000 per year from the year 1899, to the present time, and unless restrained from so doing, the defendants herein, the Gaugers of Coal and Coke, mentioned in said caption will continue to unlawfully and unjustly harrass, *b*vex and annoy your orator, and the agents of your orator in the State of Louisiana, by insisting upon and by gauging the Coal Boats and Barges of your orator, arriving within the State and demanding fees thereof, whether thereto requested or not so to do, and whether or not the Coal in such Boats, Barges, or packages is or was sold before the arrival of the same within the State, and irrespective of whether the same was or is for the use of or consumption by your orator himself,—it also being true, and being here alleged, that of the Coal so brought into the State, sixteen boat loads, more or less, are used and consumed by your orator in the conduct of its business in Louisiana.

And your orator further complaining says that the said defendants combining and confederating, by themselves and with other persons unknown to your orator, but whom, when known, your orator, reserves the right to make defendants herein, to harrass and injure your orator, and to deprive him unjustly and without lawful authority of his property, by demanding and enforcing payment by your orator of money as fees for gauging the coal of your orator, will persist and continue to gauge such coal and

will demand and seek to enforce payment by your orator of such pretended and unlawful fees.

That the acts and doings of the said defendants are contrary to law, equity and good conscience, and are in fraud of the rights and property of your orator; that the said demand and persistence in enforcing the same will occasion, as your orator fears and believes, a multiplicity of suits, which should in the interest of all parties be avoided.

That your orator is without adequate remedy at law, and that to prevent the unlawful demands of the defendants, the spo*il*ation of its property and the expense and harrassment from multiplicity of suits, your orator is entitled to the equitable writ of Injunction, forbidding and enjoining them, and either of them from demanding from your orator or any of the Agents of your orator by suits at law or otherwise any money for services or as fees for gauging any of the Coal of your orator, whether contained in Coal Boats, Barges or other receptacles or packages in the State of Louisiana save and *ac*cept such as is sold or intended to be sold or disposed of in unbroken Boats, Barges or packages, to be designated by your orator.

Wherefore, your orator prays that your honors may grant unto your orator the most gracious writ of Injunction, issuing out of and under the seal of this Honorable Court to be directed to said Louis Knop and Joseph L. Rock, enjoining them and either of them personally and as Gaugers of Coal and Coke, and their successors as such Gaugers of Coal and Coke, if such there be, and any and all of them from demanding, collecting or attempting to collect in any manner from your orator or any of the Agents of your orator any moneys for services or as fees for gauging any of the Coal of your orator, whether contained in any coal Boat, Barge or other receptacle or package, save and except such as is sold or intended to be sold by Coal Boats or Barge load, to be designated by your orator, and that

11 it will please your Honors to render decree herein declaring the said Louis Knop and Joseph L. Rock are without right or authority to demand or collect any money or fees as Gaugers of Coal or Coke, under any valid and existing law of the State of Louisiana, from your orator for gauging coal, the property of your orator, whether the same be in Coal Boats, or Barges or other receptacles or packages; save and except such as may be payable for services for gauging Coal sold or intended for sale by Coal Boat or Barge load, to be designated by your orator or its agents, and that your orator may have such other order, decree and relief as may be equitable and just; and that the writ of Injunction herein prayed for be perpetuated, and that, in the meantime and until the final hearing herein your orator have a temporary restraining order embracing all the relief herein prayed for, such restraining order to be and continue in force until final decree herein and to be binding upon all persons to whom addressed from and after the time when they shall severally have knowledge, of the entry thereof.

And may it please your Honors to grant unto your orator writs of Subpœna issuing out of and under the Seal of this Honorable Court, to be directed to the said Louis Knop and Joseph L. Rock, in-

dividually and as Gaugers of Coal and Coke, commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, to appear before this Honorable Court, and then and there to answer the premises, but not under oath, and, further, to stand and abide such order and decree therein as shall be agreeable to equity and good conscience; and your orator prays for costs, and for such further order and decree as may be equitable and just and will continue to pray.

(Signed) RICE & MONTGOMERY,
Solicitors for Complainants.

Robert W. Wilmot, being by me duly sworn, deposes and says: That he is the duly authorized Agent and Attorney in fact of the Monongahela River Consolidated Coal and Coke Company, complainant in foregoing bill of complaint; that he has heard
12 read the said Bill and knows the contents thereof; and that the matters therein stated as of his own knowledge are true; and that the matters therein stated upon information and belief he verily believes to be true. Subscribed and sworn to before me this 10th day of December 1906.

(Signed) R. W. WILMOT.

FRANK SOULE,
Not. Pub.

Order.

The foregoing bill considered, Let the said defendants show cause in the Circuit Court of the United States for the Eastern District of Louisiana, in the City of New Orleans, on Saturday, the 22nd, day of December, 1906, at 11 o'clock A. M. why an Injunction *pendente lite* should not issue as prayed for in said Bill.

December 10th, 1906.

CHARLES PARLANGE,
U. S. Judge.

13 Extract from the Chancery Order Book.

MONDAY, DECEMBER 10TH, 1906.

Notice of Filing of Bill of Complaint.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY
vs.
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal & Coke.

The Monongahela River Consolidated Coal & Coke Company, through Rice & Montgomery, Solicitors has this day filed a Bill

of Complaint against Louis Knop and Joseph L. Rock, individually and as Gaugers of Coal and Coke in the State of Louisiana by appointment of the Governor of Louisiana, herein, and the following order has been made thereon, to-wit:

The foregoing bill considered.

Let the said defendants show cause in the Circuit Court of the United States for the Eastern District of Louisiana, in the City of New Orleans, on Saturday, the 22nd day of December 1906, at 11 O'Clock A. M. why an injunction *pendente lite* should not issue as prayed for in said Bill.

December 10th, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

14 *Subpœna in Chancery. Issued to Louis Knop December 10, 1906.*

UNITED STATES OF AMERICA:

The President of the United States to the Marshal of the Eastern District of Louisiana, Greeting:

You Are Hereby Commanded to summon Louis Knop individually and as Gauger of Coal and Coke in the State of Louisiana by appointment of the Governor of Louisiana to appear before the Honorable the Judges of the Fifth Judicial Circuit of the United States of America, at a Circuit Court to be holden on the first Monday of January 1907 then and there to answer a Bill in Chancery, filed against him and another wherein The Monongahela River Consolidated Coal & Coke Company is Complainant and said Louis Knop individually and as gauger of Coal and Coke in the State of Louisiana and another are defendants.

Herein Fail Not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 10th day of December in the year of our Lord one thousand nine hundred and six and 131st year of American Independence.

[SEAL.] H. J. CARTER, *Clerk,*
By —— ——,
Deputy Clerk.

The defendant is hereby notified that he is required to enter his appearance in the Clerk's Office of the United States Circuit Court, on or before the first Monday of January 1907, otherwise the bill may be taken *pro confesso.*

H. J. CARTER, *Clerk.*
By —— ——,
Deputy Clerk.

15 On Back of Subpœna in Chancery.

Return.

United States Circuit Court, New Orleans Division.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY
vs.
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal & Coke.

Subpœna in Chancery.

Marshal's Return.

Received by U. S. Marshal, New Orleans, La., Dec 10/06 and on Dec. 19/06 I served copy hereof on Louis Knop individually and as Gauger of Coal and Coke in the State of La. by handing the same to him personally in the city of New Orleans, La.

(Signed) VICTOR LOISEL,
U. S. Marshal,
By B. F. QUEEN, *D'y.*

No. —. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed Dec. 20, 1906. E. M. Fuller, Deputy Clerk.

16 *Subpœna in Chancery. Issued to Joseph L. Rock December 10th, 1906.*

UNITED STATES OF AMERICA:

The President of the United States to the Marshal of the Eastern District of Louisiana, Greeting:

You Are Hereby Commanded to summon Joseph L. Rock individually and as Gauger of Coal and Coke in the State of Louisiana by appointment of the Governor of Louisiana to appear before the Honorable the Judges of the Fifth Judicial Circuit of the United States of America, at a Circuit Court to be holden on the first Monday of January 1907 then and there to answer a Bill in Chancery, filed against him and another wherein The Monongahela River Consolidated Coal and Coke Company is Complainant and said Joseph L. Rock, individually and as Gauger of Coal and Coke in the State of Louisiana and another are Defendants.

Herein Fail Not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 10th day of

December in the year of our Lord one thousand nine hundred and six and 131 year of American Independence.

[SEAL.] H. J. CARTER, *Clerk,*
By —— ——,
Deputy Clerk.

The defendant is hereby notified that he is required to enter his appearance in the Clerk's Office of the United States Circuit Court, on or before the first Monday of January, 1907, otherwise the bill may be taken *pro confesso.*

H. J. CARTER, *Clerk,*
By —— ——,
Deputy Clerk.

17 *Marshal's Return.*

United States Circuit Court, New Orleans Division.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY
vs.
LOUIS KNOP & JOSEPH L. ROCK, Individually and as Gauger of Coal & Coke.

Subpœna in Chancery.

Marshal's Return.

No. —.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

Filed Dec. 14/1906.

E. M. FULLER, *D'y Clerk.*

Received by U. S. Marshal, New Orleans, La., Dec. 10/06, and on Dec. 13/06 I served copy hereof on Joseph L. Rock, individually and as Gauger of Coal and Coke in the State of Louisiana by handing the same to him personally in the city of New Orleans, La.

(Signed) VICTOR LOISEL,
U. S. Marshal,
By B. F. QUEEN, *D'y.*

18 Extract from the Minutes, November Term 1906.

Hearing and Submission of Application for Injunction.

NEW ORLEANS, SATURDAY, *December* 22, 1906.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, District Judge.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE CO.
vs.
LOUIS KNOP and JOS. L. ROCK.

This cause came on to be heard upon the motion for an injunction *pendente lite*—Rice & Montgomery appearing for the plaintiff; Walter Guion, Attorney General for Defendants—and was argued by counsel and submitted when the Court took time to consider.

19 *Affidavit of R. W. Wilmot for Complainant. Filed December* 22, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY
vs.
LOUIS KNOP and JOSEPH L. ROCK, Coal Gaugers.

Robert W. Wilmot, being by me duly sworn, deposed said: The he is the duly authorized agent of the Complainant, The Monongehela River Consolidated Coal & Coke Company, in the State of Louisiana, and has been such Agent since say, the 1st day of October 1899, that the business of selling coal in said States, is as follows: Of retailing to citizens or residents Coal by the barrel, in small quantities, for home use and consumption; and selling to manufacturers and business establishments, coal in like manner; in selling to and placing on board Steamboats and steamships to enable them to make voyages, coal measured by the box of 6048 Cubic inches, or by the *ton*, but not by Coal Boat or Barge load, in selling to rail roads Coal for the use & consumption of such roads by the *ton*, but not by the boat or barge load, or with refeverence to the contents of any boat or barge loaded or partly loaded, but is weighed by the Railroad ton by ton and delivered, that the respondents do not and never have weighed the Coal of the Complainant brought into the State of Louisiana, that in all cases of delivery to manufacturers, steamboats, ships and railroads, the delivery is made by breaking or from broken packages, and not by the unbroken packages; that the

exception to the above rule is the sale, under contract of unbroken packages to the United Fruit Company, for the use of its steamships, amounting to say 50 to 80 boat loads per annum, and the sale, also of say 125 unbroken packages or boat loads to dealers, for resale, and the sale and delivery of say 35 to 40 boat loads of Coal per annum to planters in Louisiana, for the Manufacture of their Sugar Crops; that the complainant uses and consumes, of the coal transported by it to Louisiana, in the carrying on of its own business say the equivalent of Sixteen (16) Boat loads. The coal sold at retail as herein stated is generally removed from the boat on which
20 it has arrived into yards, in the City of New Orleans, from which it is sold in quantities of from 5 barrels upwards and delivered to the purchasers in wagons. Deponent annexes hereto blank receipts showing complainant's method of selling coal to Steamboats; and blank form of its contracts for delivery of Coal to Steamships, marked, respectively A and B and made part of this affidavit.

(Signed) R. W. WILMOT.

Subscribed and sworn to before me this 22nd day of December 1906.

W. MORGAN GURLEY,
Not. Pub.

"A."

Steamboat Receipt.

NEW ORLEANS, —— 190-.

Received from W. G. Wilmot & Co., Agents, — Boxes of Pittsburgh Coal at — cts. per box for use of Steamboat —— and Owners.

—— ——, *Clerk.*

21 "B."

NEW ORLEANS, LA., ——, 190–.

Memorandum of Agreement between Messrs. ——, of ——, and Messrs. ——, of New Orleans, La., as Agents of the Monongahela River Consolidated Coal and Coke Co., of Pittsburgh, Pa.

Messrs. —— ——, Agents, undertake to supply all the Bunker Coal Messrs. —— —— may require at New Orleans for the use of all the Steamships of which they are the Registered Managing Owners, or which they may operate on time charter. Messrs. —— —— on the other hand, undertake to receive all the Coal so Required from Messrs. —— ——, Agents on the following terms:

Pittsburgh Steam Coal at — Dollars ($—) per ton 2,000 lbs. trimmed in bunkers.

Payment for coal supplies to be in Cash, as customary.

This Agreement comes into force on —— 190- and is binding until —— 190- but the suppliers shall not be bound to deliver coal

in the event and during the continuance of strikes or lock-outs of workmen, or stoppage of mines or railways, whether general or partial, or other unavoidable causes beyond their control, whereby the working of this contract is effected; and in the event of war or hostilities in any way effecting the execution of this Agreement, the same is to be cancelled or to be subject to modifications as may be mutually agreed.

(Copy) Form of S. S. Contract used by M. R. C. C. & C. Co., at New Orleans.

22 *On Reverse.*

13437. U. S. Circuit Court. Exhibit B. Offered by Complainant, in connection with the testimony of Robt. I. Whann. Filed *nunc pro tunc* as of date June 9th, 1908. (Signed) H. J. Carter, Clerk.

23 *Affidavit of Louis Knop and Jos. L. Rock. Filed nunc pro tunc as of Date December* 22, 1906.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

No. 13437.

Monongahela River Consolidated Coal and Coke Company
vs.
Louis Knop and Joseph L. Rock, Individually and as Gaugers of Coal and Coke.

Before me, the undersigned authority, personally came and appeared Louis Knop and Joseph L. Rock, who on being duly sworn depose and say, that they are the State Gaugers of Coal and coke, of the State of Louisiana, holding their commission from the Governor of said State under the provisions of act No. 147 of 1888; that they qualified to said office fully two years ago and have been in the active discharge and performance of the duties of said office continuously since.

Affiants depose and say further that it is not true, as alleged in the 14th paragraph of the Bill of Complaint, that any coal has arrived from the State of Alabama during the period of time that they have been performing their duties as State gaugers of coal and coke, either in boats or barges.

Affiants depose further and say that, in the discharge of their duties as coal and coke gaugers, they have not discriminated in favor of or against coal arriving in the State of Louisiana, whether in boats or barges, and that they have in the performance of their duties endeavored to gauge and have gauged all boats and barges containing coal and coke sold or delivered in the State of Louisiana during the period of time that they have been in office as State Gaugers of coal and coke, and that no boats or barges containing

coal or coke, sold or delivered in the State of Louisiana, have faile
to be gauged by affiants so far as affiants have knowledge
24 the same, as it has been their constant aim and endeavo
ever since they have been in office, to gauge all boats an
barges sold or delivered in the State of Louisiana, containing co
and coke, without discrimination whatever.

LOUIS KNOP.
J. LEWIS ROCK.

Sworn to and subscribed before me, this 19th day of January 1907.

ALEXIS BRIAN,
Notary Public.

We consent that the foregoing affidavit may be filed *nunc pro tun*

RICE & MONTGOMERY,
Solicitors for Complainants.

February 1st, 1907.

25 *Notice to Enter Appearance. Filed January 8th,* 1907.

United States Circuit Court, Eastern District, New Orleans Divisio

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPAN
vs.
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers
Coal and Coke.

The Clerk of the above entitled Court will please enter this n
appearance for the defendants in the above numbered and entitl
cause.

(Signed) WALTER GUION,
Attorney General, Solicitor for Defendants.

No. —. U. S. Circuit Court, Eastern District of Louisiana. File
Jan. 8, 1907. H. J. Carter, Clerk.

26 Extract from the Chancery Order Book.

Appearance of Defendants, Jan. 8, 1907.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY
vs.
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers
Coal & Coke.

Now comes Walter Guion Attorney General of Louisiana a
enters his appearance as solicitor for the defendants Joseph L. Ro
and Louis Knop to the Bill of Complaint herein.

27 *Agreement to Extend Time for Filing Answer. Filed February* 1, 1907.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
vs.
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal and Coke.

It is hereby agreed and consented that defendants in the above numbered and entitled cause shall be given and allowed until the first Monday of March, 1907, to file their answer in said cause.

(Signed) RICE & MONTGOMERY,
Solicitors for Plaintiffs.

28 *Decree. Entered and Filed February* 20, 1907.

United States Circuit Court, Eastern District of Louisiana.

No. 13437.

THE MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
vs.
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal and Coke.

This cause came on to be heard on the application of the complainant for an injunction *pendente lite*, and upon the bill of complaint, the affidavits of complainant and defendants, and was submitted, without argument, and the Court being fully advised in the premises, and that such preliminary restraining order should not issue.

It is, therefore, ordered and decreed that the application of complainant for an injunction *pendente lite* be and the same is hereby refused, but upon the condition, however, that defendants, Louis Knop and Joseph L. Rock, both individually and as State Gaugers of Coal and Coke, do enter into and furnish bond, with good and solvent security, in the sum of Five Thousand Dollars, ($5000) conditioned to return, pay to, and reimburse the Complainant, the Monnongahela River Consolidated Coal & Coke Company, any and all such sum or sums, with legal interest thereon from respective dates of payment thereof, as shall have *paid been* to them as fees as gaugers of Coal & Coke, by said Complainant, from and after the filing of this cause, in case it shall be determined, upon final decree

herein, that plaintiff is entitled to relief prayed for in the said bill of complaint.

Feb'y 21st, 1907.

(Signed) ALECK BOARMAN, *Judge.*

29 *Answer. Filed March 4th, 1907.*

United States Circuit Court, Eastern District of Louisiana, New Orleans Division. Equity.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY

vs.

LOUIS KNOP and JOSEPH L. ROCK, Individually and as State Gaugers of Coal and Coke.

The answer of Louis Knop and Joseph L. Rock, individually and as State gaugers of coal and coke for the State of Louisiana, defendants to the bill of complaint of the Monongahela River Consolidated Coal and Coke Company, complainant.

These defendants now, and at all times hereafter, reserving unto themselves the benefit of any and all exceptions that can or may be taken to said bill of complaint, on account of its many errors, insufficiencies and uncertainties, for answer thereto and to such parts thereof as they are advised it is material for them to answer unto, answering say:

1.

That the matters and things averred in the first, second, third, fourth, fifth, eighth and ninth paragraphs of said bill of complaint are true and they admit the allegations contained therein.

2.

Further answering, respondents say that while it may be true, as alleged by complainant in the sixth paragraph of the bill of Complaint, that prior to the past two or three years, the coal transported into the State of Louisiana by complainant, was, to the extent of say one-half thereof or more, sold and delivered to planters for use and consumption by them, and especially upon sugar plantations, and that such sales were usually by the coal boat or barge load, but that, in consequence of the introduction and general use of fuel oil by very many such planters, on their plantations, the demand for and sales for such consumption and use has been
30 greatly reduced and has not exceeded, during the year last past, and is not likely, for the year to come, to exceed thirty five or forty boat or barge loads; and while it may also be true as alleged by complainant in the same paragraph of the bill of complaint, that complainant sells and delivers coal to certain dealers

in Pittsburg coal, in, and in the neighborhood of, the City of New Orleans, by the boat load or barge load, in an average amount of not exceeding say one hundred and twenty five (125) boat or barge loads per year, and that it may, fairly, be anticipated that complainant will continue to so sell and deliver Pittsburg coal in such boat and barge load lots, for the period of the next year and other ensuing years, they can neither admit nor deny the allegations so made by complainant, and that as respondents have no knowledge, information or belief in respect to the said allegations, they, therefore, deny the same.

Respondents deny, further, the allegations contained in the said sixth paragraph of the bill of complaint, that by far, the principal sales and dispositions of the coal transported by complainant into the State of Louisiana are by the barrel or by weight, in broken packages, wholly without relation to the amount, in measure or weight, or such coal in such boats or barges, and they further deny the allegations contained in said sixth paragraph of the bill of complaint that the measurement or weight of such coal is fixed and determined by actual measurement or weighing at the time of delivery to the purchaser. They deny further the allegations contained in said sixth paragraph of the bill of complaint that the ascertainment of the cubic or weight contents of an entire boat or barge load of coal is of no use or guide or value or benefit to complainant or to the person or persons to whom such coal may be sold and delivered, and that the same serves neither to protect complainant or the said person or persons nor any other person whatsoever. And respondents deny further that complainant uses and consumes annually, for its own use, sixteen boat loads, more or less, or their equivalent, of the coal so transported into the State of Louisiana by com-
31 plainant.

Further answering, respondents aver that, so far from said allegations so contained in said sixth paragraph of the bill of complaint, being true, they again deny the same and say that all of the boats and barges containing coal annually brought into the State of Louisiana by complainant, for sale or delivery, are so sold and delivered by complainant by the boat load or barge load. Further answering respondents say that, even if it be true that a part of the coal so brought, annually, into the State of Louisiana by complainant, be sold and delivered by the barrel or by weight or, as alleged by complainant, in what complainant styles broken packages and wholly without relation to the quantity, in respect to the measure or weight of coal contained in such boats and barges, but by actual measurement or weighing at the time of delivery to the purchaser, which however is denied, nevertheless it was entirely competent for the State of Louisiana, as was done by and through certain acts passed and enacted by the General Assembly of that State, and which are complained of by complainant in the bill of complaint, to provide for the gauging of all such boats and barges, whether the coal contained therein be sold or delivered by the whole boat or barge load or part of same, in the exercise of the police power of the said State.

3.

Respondents, for further answer, say they deny that the General Assembly of the State of Louisiana purported to enact act No. 147 of 1888, approved July 12th 1888, as alleged by complainant in the seventh paragraph of the bill of complaint, but that it did actually, enact said act, and that the same contains all of the provisions fully set forth in the Seventh paragraph of the bill of complaint, herein.

4.

Respondents further answering say they deny that, by enacting act No. 80, of 1904, approved July 1st, 1904, the General
32 Assembly of the State of Louisiana did purport to amend said act No. 147 of the General Assembly of the State of Louisiana, approved July 12th 1888, but that it did amend and reenact the same by enacting said Act No. 80 of 1904, which contains the provisions fully set forth in the tenth paragraph of the bill of complaint, but respondents deny that by the passage and enactment of said Act No. 80 approved July 1st, 1904, act No. 137 of 1894 and act No. 58 of 1902, were repealed, but that the same are in full force and effect.

5.

Respondents deny that said act No. 147 of the General Assembly of the State of Louisiana, approved July 12th, 1888, or said act No. 80 of the said General Assembly approved July 1st, 1904, or said acts Nos. 137 of 1894 and No. 58 of 1902, were and are in violation of article 29 of the constitution of the State of Louisiana adopted in the year 1879 and of article 31 of the Constitution of said State, adopted in the year 1898, and they deny further that said acts aforesaid, or either of them, are in violation of the bill of rights, article I of the aforesaid Constitution of the State of Louisiana, adopted in the year 1879, or of Article I, the bill of rights, of the Constitution of said State, adopted in the year 1898. They deny further that either of the aforesaid acts of the General Assembly of the State of Louisiana sought by complainant to be declared unconstitutional, is in violation of article I section 8, clause 3 of the Constitution of the United States giving to the Congress of the United States the power to regulate commerce with foreign nations and among the several States and the Indian tribes.

6.

Respondents deny the allegations contained in the twelfth paragraph of the bill of complaint that complainant has, at no time, assented to the validity and binding force of the aforesaid
33 acts of the General Assembly of the State of Louisiana governing the gauging of coal. Respondents aver that the allegation contained in said Twelfth paragraph of the bill of complaint that the larger part of the transactions and sales of coal made by complainant in the State of Louisiana were and have been made by the boat or barge load, is only partially true, for the truth is, as

respondents do now aver, that all of the sales of coal made by complainant in the said State have been by the boat load or barge load.

Further answering, respondents deny that complainant has ever denied the validity and binding force of the aforesaid acts of the General Assembly of the State of Louisiana, or any of them, and that it has refrained from contesting the same for the reasons set forth in the twelfth paragraph of the bill of complaint. That, on the contrary, complainant has long since acquiesced in the validity, legality and constitutionality of all of said acts; that it has always complied with all the provisions of the same, in every respect, ever since their enactment; and that by long silence and acquiescence, on its part, complainant has estopped itself and is now estopped from contesting either, all or any of said acts of the General Assembly of the State of Louisiana. And respondents aver further that it has never come to their knowledge, or been made known to them, nor is it a fact that complainant had not fully acquiesced in the validity and binding force of said acts, and that the allegation contained in the twelfth paragraph of the bill of complaint to that effect is untrue.

7.

Further answering, respondents aver that the allegations contained in the thirteenth paragraph of the bill of complaint are not true, and further answering the same respondents aver that it has been finally judicially determined by the Supreme Court of the State of
34 Louisiana and by the Supreme Court of the United States that the laws enacted by the General Assembly of the State of Louisiana on the subject of the gauging of coal by State Gaugers of coal and coke are legal and valid and constitutional, as proper inspection laws of the State of Louisiana, which that State had the right to enact in the exercise of the police power of said State.

8.

That the matters and things averred in the Fourteenth paragraph of the Bill of complaint are partly true and partly untrue. That it is true the respondents have been and are accustomed to meet the coal fleets or tows of complainant as they enter the State of Louisiana, and to gauge each and all of the coal boats and barges therein intended for sale or delivery to others in the State of Louisiana, and thereafter to demand of complainant, as they had and have the legal right to do, the fees fixed by the various acts aforesaid of the General Assembly of the State of Louisiana on the subject, and it is true that respondents will continue so to gauge the coal boats and barges thus brought into the State of Louisiana by complainant for sale or delivery to others, but respondents aver that it is not true, as alleged by complainant, that any of the said coal boats and barges so gauged by respondents have been intended to be used or consumed by complainant,) and (that none of the same have been sold or delivered otherwise than by a boat load or barge load,) but that all the same even if any of said boats or barges were sold or delivered by complainant in quantities less than a boat load or barge load or by weight, the same would be subject to be gauged by respondents under

the laws of the State of Louisiana which are proper legal and valid inspection laws of said State within the meaning of the Constitution of the United States. That said acts of the General Assembly of the State of Louisiana are not invalid or oppressive, and the same do not deprive complainant of its property without due course of
35 law, and that the same have been acted upon and recognized as valid inspection laws. (Further answering respondents deny the allegations contained in the fourteenth paragraph of the bill of complaint that coal from the State of Alabama has been and is now arriving constantly in the State of Louisiana in coal boats and barges, or in cars by railroad, which has not been held subject to *gua*ging or to weighing under the several acts of the General Assembly of the State of Louisiana on the subject of the *gua*ging and weighing of coal in that State.

9th.

Further answering, respondents say that the matters and things averred in the Fifteenth Paragraph of the bill of complaint are untrue; but that, under any circumstances, even if it be true, as alleged by complainant, that complainant has refused to recognize the validity of the several acts of the General Assembly of the State of Louisiana on the subject of the *gua*ging of coal sold or delivered in the State of Louisiana, and that complainant has likewise repeatedly denied the right or necessity for the *gua*ging of its coal because of the invalidity of the said acts of the General Assembly of said State, and because the same are not inspection laws within the meaning of the Constitution of the United States, all of which is denied, nevertheless the said acts of the General Assembly of the State of Louisiana are legal, valid and constitutional as proper inspection laws of that State, passed and enacted in the exercise of her police power.

10th.

Further answering, respondents say that, as to the matters and things set up in the Sixteenth paragraph of the bill of complaint, these defendants have no knowledge, information or belief, and, therefore, they deny the same. Respondents aver, however, that it is true, as averred by complainant, in the said paragraph of the bill of complaint, that respondents will continue to demand from complainant their compensation or fees as State *gua*gers of coal
36 and coke for the ensuing year and for each year to come as long as the business of complainant shall continue, but that respondents are unable to state what that amount will be as the same must depend upon the number of boats and barges of coal brought into the State of Louisiana by complainant. Respondents aver, however, that the matter in controversy does not exceed in value the sum of two thousand dollars exclusive of interest and costs, and that the same does not arise under the Constitution of the United States.

11th.

Respondents further answering say that the matters and things averred in the Seventeenth paragraph of the complainant's bill are untrue.

12th.

That as to the matters and things set up in the Eighteenth paragraph of the bill of complaint, these defendants have no knowledge, information or belief, and, therefore, they deny the same. They aver, however that they will continue to *guage*, as they have been doing, all boats and barges of coal brought by complainant into the State of Louisiana for sale or delivery in that State and to demand the fees or compensation for their services to which they are entitled under the laws of the State of Louisiana.

13th.

That as to the matters and things set up in the Nineteenth paragraph of the bill of complaint, these defendants have no knowledge, information or belief and, therefore, they deny the same. Further answering, they aver that they intend to continue to *guage* all the boats and barges of coal of complainant brought by them into the State of Louisiana for sale or delivery to others and to demand the fees fixed by law for such services, whether requested to *guage* the same or not, but they deny that in so doing they have
37 any intention to harass, vex or annoy complainant, but that they will be acting within the laws of the State of Louisiana in the discharge of their duty as coal *guagers* of the State of Louisiana, which is made compulsory by law upon them, and they deny further that they will *guage* any other coal than such as may be sold by complainant or intended by them for sale to others in the State of Louisiana. Respondents deny further that they have combined or confederated with other persons to harass or injure complainant, or to deprive complainant unjustly or without lawful authority of its property, and that by demanding and enforcing payment from complainant of the fees due respondents for *guaging* complainant's coal as aforesaid, they will, in no wise, harass or injure complainant or deprive complainant unjustly and without lawful authority of its property in that the fees which respondents have charged and will continue to charge and demand for their services as coal *guagers* are such as they are entitled to by law. Respondents deny further that their acts and doings are contrary to law, equity or good conscience, and that the same are not in fraud of the rights and property of complainant.

And now having fully answered, confessed, traversed and avoided or denied all the matters in said bill of complaint meterial to be answered according to their best knowledge and belief, respondents pray this Honorable Court to enter its judgment that these respondents be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

(Signed) WALTER GUION,
Attorney General of Louisiana,
Solicitor for Defendants.

38 *Replication. Filed March 30th,* 1907.

United States Circuit Court, Eastern District of Louisiana

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
vs.
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal and Coke.

The replication of the Monongahela River Consolidated Coal & Coke Company, complainant, to the answer — Louis Knop and Joseph L. Rock, the defendants, individually and as State gaugers of coal & coke.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of advantage of exception which may be had and taken to the manifold insufficiencies of the said answer for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this; that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he has already prayed.

(Signed) RICE & MONTGOMERY,
Solicitors for Complainants.

39 *Motion and Order Appointing Master. Entered and Filed May* 21, 1907.

United States Circuit Court, Eastern District of Louisiana.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY
vs.
LOUIS KNOP and JOSEPH L. ROCK, Coal Gaugers.

On motion of complainant through his solicitors, Rice & Montgomery, for appointment of Master in said cause:

It is ordered by the Court that William Grant, Esq., be and is hereby appointed Master in said cause, to examine the record and the evidence now on file or hereafter taken herein, and to make a

special finding of *a* facts on the issue joined between the parties, and to report the same to the Court and his conclusions of law thereon.

New Orleans, La., May 21st, 1907.

(Signed) EUGENE D. SAUNDERS, *Judge.*

Consented to and approved by

WALTER GUION,

Att'y Gen'l, Solicitor for defendants.

(Signed) RICE & MONTGOMERY,

Solicitors for Complainant.

40 *Order Associating E. H. McCaleb, Jr., as Counsel for Defendants. Filed May 8th, 1908.*

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

No. 13437.

THE MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY

versus

LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal and Coke.

Now come the defendants, Louis Knop and Joseph L. Rock, individually and as Gaugers of Coal and Coke, by Walter Guion, their counsel, and state to the Court, on the hearing herein, that E. H. M'Caleb, Jr., has been associated by said defendants as one of their Counsel in this cause, and move that the proper entry be made thereon.

It is ordered, That the Clerk of the Court make minute of the same, and that said E. H. M'Caleb, Jr., is so associated of record as of Counsel to said defendants in this cause.

(Signed) WALTER GUION,

Attorney General.

May 8th, 1908.

41 *Hearing and Submission of Case.*

Extract from the Minutes, April Term, 1908.

NEW ORLEANS, TUESDAY, *June 9th*, 1908.

Court met pursuant to adjournment.

Present: Hon. Eugene D. Saunders, District Judge.

No. 13437.

THE MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY

vs.

LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal & Coke.

This cause came on this day for final hearing upon the Bill of Complaint, the answer of defendants, the replication, and the exhibits,

proofs and testimony offered by the Solicitors for the respective parties, as per their Notes of Evidence on file, and was argued by the counsel for the parties respectively, to-wit: Charles S. Rice, Esq., Solicitor for Complainant, E. H. McCaleb, Jr., Esqr., Solicitor for the Defendants; and was submitted to the court, and taken under advisement.

42 Filed June 9th, 1908, *nunc pro tunc.*

United States Circuit Court, Eastern District of Louisiana.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY
versus
JOSEPH L. ROCK and LOUIS KNOP, Individually and as State Gaugers of Coal and Coke.

Note of Evidence for Complainant.

1. Interrogatories and Cross Interrogatories propounded to George W. Theiss, Charles H. Van Dyke, and T. A. Rowand, and agreement annexed to Interrogatories.
2. The answer of George W. Theiss, thereto, with Commissioner's Certificate annexed.
3. & 4. Like answer of Chas. Van Dyke, and T. A. Rowand, with Commissioner's certificates annexed.
4. The written evidence of Paul M. Schneidau, Robt. I. Whann, Elmer E. Wood, and Robert W. Wilmot; and that of Frank S. Walsh in rebuttal.
5. Document "Exhibit B."
6. Bill & Answer.

Copy Act No. 147 of General Assembly of Louisiana of 1888; of No. 137 1894; of No. 58 of 1902, and of No. 80 of 1904.

(Signed) RICE & MONTGOMERY,
Solicitors for Complainant.

43 COMPLAINANT'S EVIDENCE.

Interrogatories Propounded to George W. Theiss, Charles H. Van Dyke, and Thos. A. Rowand and Agreement Annexed

United States Circuit Court, Eastern District of Louisiana.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
vs.
LOUIS KNOP & JOSEPH L. ROCK, Individually and as State Gaugers of Coal & Coke.

Interrogatories propounded to George W. Theiss, Charles H. Van Dyke, and T. A. Rowand, all residing or doing business in Pittsburg, in the State of Pennsylvania, witness on behalf of the above-named complainant to be answered under oath, and the answers thereto to be used, subject to all legal objections, as evidence on the trial of above entitled and numbered cause.

First interrogatory. Please to state your full name, your age, residence and occupation; and your residence and occupation, and official connection, if any with the Complainant Company since say October 1st, 1899.

Second interrogatory. State, if you know when complainant began business and where is and has been its principal or home office.

Third interrogatory. State, if you know, what is the business in which the Complainant is now and has been engaged, since say the first day of October 1899, and, if you answer that it has been in part or whole engaged in the mining of bituminous Coal state where its mining operations have been and are now carried on, and generally, what disposition has been and is now being made of the coal so mined by Complainant.

44 Fourth interrogatory. State whether or not you have been, during the time referred to in the next preceding Interrogatory, familiar with the shipments to, sales or other disposition of such Coal, in the State of Louisiana—whether such familiarity is derived from taking part in such shipments sales or other disposition of coal, or from the records of the business of Complainant; and if from such records, state your knowledge as to the correctness of such records how the same are made or kept.

Fifth interrogatory. If, in answer to the Third or Fourth Interrogatories preceding you say that all or any portion of the Coal mined by the Complainant is shipped and transported to, for sale or other disposition in the State of Louisiana, describe the methods or manner of making such shipments—whether by railroad or water, or otherwise; as well as the routes of such shipments; describe the packages, receptacles, boats or barges, or other means by which such shipments have been and are now made—the capacity or measure-

ment of such packages, receptacles, boats, barges, or other means o transportation—the capacity in units of barrels, and short tons, o such packages, receptacles, boats, barges or other means of trans portation.

Sixth interrogatory. State, if you know, what disposition of th Coal so shipped and transported, if any, by complainant, to the Stat of Louisiana, is made in that State—to what class of persons, or con sumers, or what lines of business, for what purposes—and whethe for resale, consumption or use.

Seventh interrogatory. State if you are able to do so, the numbe of packages, Coal boats, Barges, etc., loaded with Coal, sold, consume or otherwise disposed of by the Complainant, in the State if Louis iana, yearly beginning October 1st, 1899, to say the 30th of Septem ber, 1907.

45 Eighth interrogatory. State, if you know, how many o such packages, Coal Boats or Barges of Coal, or what propor tion thereof, have been sold or disposed of whole or unbroken, during each year referred to in the next preceding Interrogatory and stat how many have been sold or otherwise disposed of, in broken o part packages, Coal boats or barges during each year of that time;— and explain what you mean by "broken" package, Coal Boat o Barge.

Ninth interrogatory. The Statutes of the State of Louisiana pro vide that no boat load of coal or coke nor any part thereof, shall b delivered to the purchaser, whether the sale thereof was made withi or without the State, until the same has been inspected as by th Statute provided and that any person, partnership, firm or corpora tion who shall sell or deliver in this State a boat load or barge loa of coal or coke or any part thereof that has not been *guaged* as in th Statutes provided or who, within twenty-four hours after the arriva in Louisiana of any boat or barge loaded with Coal or Coke, shal not have notified the State Coal *Guagers* or either of them at thei offices in the City of New Orleans, of its arrival in the State, re questing that the same be gauged as aforesaid shall be liable to a penalty of fifty dollars ($50) for each boat or barge of coal or Coke or part thereof so sold or delivered, and for each boat or barge s arriving in the State of Louisiana of which no notice was given t the said Coal *Guagers*, to be recovered with costs of suit in any Court of Competent jurisdiction for the benefit of the Charity Hospital of the City of New Orleans.

Gauging as defined by the Statutes, consists in reducing the length, breadth and depth inside measurement of boats or barges, deduct ing all obstructions and displacements, into cubic inches and 46 dividing said cubic inches by 2688, thus ascertaining the net measurement in bushels, and that two and six tenths bushels shall constitute a barrel.

State, if you know what service, advantage or benefit is effected by such gauging of Coal or Coke to either the complainant, as seller or consumer, or to the purchaser of Coal and Coke when such sale, con sumption, or purchase is of a broken package, or part of a package, boat or barge of such coal or coke and whether or not, the *guaging*

of the full package, boat or barge, to be sold, consumed or purchased, in broken or part packages, boat or barge loads, is not wholly useless; and the cost of such gauging a taking of property without compensation therefor.

Tenth interrogatory. Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties in this cause, or either of them or that may be material to the subject of this your examination, or the matters in question in this cause. If yea, sea forth the same fully and at large in your answer.

(Signed) RICE & MONTGOMERY,
Solicitors for Complainant.

47 It is hereby consented and agreed that, for the purpose of obtaining the answers of the several witnesses named to the foregoing Interrogatories and Cross-Interrogatories, W. T. Lindsay, Clerk of the United States District Court, and United States Commissioner for the Western District of Pennsylvania, be and is hereby named as Commissioner: that the issuance of a Commission is waived and that the said Commissioner shall make return of what he shall do in the premises to Henry J. Carter, Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

New Orleans, La., May 9th, 1908.

(Signed) RICE & MONTGOMERY,
Solicitor for Complainant.
E. H. McCALEB, JR.,
(Signed) WALTER GUION,
Of Counsel.

48 *Cross-interrogatories.*

United States Circuit Court, Eastern District of Louisiana.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY
versus
LOUIS KNOP & JOSEPH L. ROCK, Individually and as State Gaugers of Coal and Coke.

Cross-interrogatories to be propounded to George W. Theiss, Charles H. Van Dyke, and T. A. Rowand, all residing and doing business in Pittsburg, in the State of Pennsylvania, witnesses on behalf of the above-named complainant, to be answered under oath, and the answers thereto to be used, subject to all legal objections, as evidence on the trial of above entitled and numbered cause.

First cross-interrogatory. Is it not a fact that each and every boat or barge containing coal or coke shipped by the Complainant, comes into the State of Louisiana, in full boat or barge loads, or crosses the State line in full boat or barge loads, where said coal or coke is sub-

sequently delivered by said coal or coke boat loads, in whole or in part, to purchasers for consumption and re-sale in Louisiana?

Second cross-interrogatory. Is it not a fact that said full boat or barge loads of said coal or coke have been gauged by the defendants in this case and their predecessors in office, prior to the institution of this suit, without any objection on the part of complainant and with the consent and acquiescence of the Complainant in said gauging, in accordance with the Statutes of the State of Louisiana? If this is not a fact, please state specifically when and where an objection, if any, was made, and in what form said objection came to
defendants or their predecessors in office?

49 Third cross-interrogatory. Is it not a fact that full boat or barge loads of coal or coke have been sold and delivered by the complainant to railroads in Louisiana by ton weight, and after said full boat loads of coal or coke have been gauged by the defendants or their predecessors in office?

Fourth cross-interrogatory. What is the weight of a barrel of coal? If you cannot state it exactly, please give such weight approximately? Also give the weight of a bushel of coal? State either exactly or approximately?

Fifth cross-interrogatory. How many bushels of coal or coke, or either, does it take to make a ton of coal or coke? State how many barrels or fraction of a barrel does it take to make a ton of coal or coke?

Sixth cross-interrogatory. To whom are these coal boats or barges consigned in Louisiana, whether to your agent in New Orleans or to other parties?

Seventh cross-interrogatory. Relative to the coal used and consumed by you in carrying on your coal business in the city of New Orleans, sold by you at retail and delivered from your yard in the City of New Orleans, how is said coal sold and delivered, by barrel or by ton?

Eighth cross-interrogatory. Please give the size and measurement of the packages and receptacles for the barrels or bushels used by you in delivering coal within the State of Louisiana? How many bushels does said packages or receptacles contain and give the equivalent in barrel measurement?

Ninth cross-interrogatory. *It is* not a fact that there are no known coal mines of any description whatsoever within the State of

50 Louisiana, and is it not a fact that no coal is produced or mined within this State, but that all coal within the State of Louisiana is shipped either by rail or water from other States of the Union, particularly Pennsylvania and Alabama.

(Signed) WALTER GUION,
For Defendants.

(Signed) E. H. McCALEB, JR.,
Of Counsel.

On Reverse: 13437. U. S. Circuit Court. Cross-interrogation propounded to George W. Theiss, Chas H. Van Dyke, & Thos. A. Rowand. Offered by Complainant. Filed *nunc pro tunc* as of date June 9/1908. (Signed) H. J. Carter, Clerk.

51 *Answers of George W. Theiss.*

Offered by Complainant and Filed *nunc pro tunc* as of Date June 9, 1908.

United States Circuit Court, Eastern District of Louisiana.

No. 13437.

Mono-gahela River Consolidated Coal & Coke Company
versus
Louis Knop & Joseph L. Rock, Individually and as State Gaugers.

Answer of George W. Theiss.

Interrogatories to be propounded to George W. Theiss, residing and doing business in Pittsburgh, in the State of Pennsylvania, Witness on behalf of the above-named Complainant, to be answered under oath, and the answers thereto to be used, subject to all legal objections, as evidence on the trial of above entitled and numbered cause.

Answer to first interrogatory. My name is George W. Theiss, age 51-yrs. residence #141 Dithridge Street, Pittsburg, Pennsylvania. Occupation, President of The Monongahela River Consolidated Coal & Coke Company of Pittsburgh, Pennsylvania.

I have been connected with the said Company since its organization on October 1st, 1899. First, for a period of four years after its organization, as Secretary, four years thereafter as vice President, and President since January 15th, 1908. I have been a director of said Company since about January, 1901.

Answer to second interrogatory. The Monongahela River Consolidated Coal & Coke Company was organized and began doing business on the first day of October, 1899. Its principal and home office has, since that time, been in the City of Pittsburgh, Pennsylvania.

Answer to third interrogatory. The company is engaged chiefly in operating coal mines and producing coal, on the Monongahela River, in the State of Pennsylvania, in addition to which it also operates a mine on the Illinois Central Railroad, at De Koven, in the State of Kentucky. The product from the mines on the Monongahela River, as well as that in the State of Kentucky, is disposed of, partially by shipping by rail and partially by river.

Incident to marketing the company's product it also operates a large number of steamboats, tugs, coal-boats and coal barges.

52 The Company's coal product, the average of which is from 6,000,000 to 7,000,000 tons per annum is marketed both by river and by rail. About ⅓rd of the production is disposed of by rail, which is shipped largely into the States of Ohio, Indiana, Illinois, Pennsylvania, New York, Michigan and by rail to the lake ports and thence to the Northern Lake districts via lakes to viz.

Milwaukee, Duluth and West Superior, from whence it is again re-shipped by rail to interior points, chiefly among which is St. Paul, Minneapolis and other points. It also ships by rail exclusively, and by rail and lake, to Canadian points. Its river ship-ments, consisting of about 4,000,000 tons per annum, are disposed of in the States of Pennsylvania, West Virginia, Ohio, Kentucky, Indiana, Tennessee, Missouri, Arkansas, Mississippi and Louisiana. A certain percentage of the production is again re-shipped from points on the Ohio and Mississippi Rivers, by rail into the interior.

Answer to fourth interrogatory. I was, for a period of 10 yrs., from 1888 to 1899, prior to my connection with the Monongahela River Consolidated Coal and Coke Company, actively engaged in shipping coal from Pittsburgh to the State of Louisiana and marketing the same in that State, and was familiar with all conditions relating to the marketing of coal in that state. I have since October 1st, 1899, as an officer and manager of The Monongahela River Consolidated Coal and Coke Company been actively engaged in shipping coal from the Pittsburgh district into the State of Louisiana and marketing the same and am thoroughly familiar with every feature connected with shipping the coal into the State of Louisiana and marketing the same in said State. I likewise have a general knowledge of the records and system of accounting of The Monongahela River Consolidated Coal & Coke Company, as relates to the marketing of its coal in the State of Louisiana and elsewhere, and can vouch for the correctness and accuracy of the same.

Answer to fifth interrogatory. That part of the coal production of The Monongahela River Consolidated Coal & Coke Company which is shipped into the State of Louisiana, is shipped via the Monongahela, Ohio and Mississippi rivers, into the State of Louisiana. The packages, receptacles, boats or barges, in which said coal is shipped are chiefly of the following type. (*a*) *Coal boats:* The dimensions of which are

53 Length .....175 Ft.
Width .....26-ft.
Depth .....8-ft. to 10-ft.

Car-ying capacity from 800 to 1000 net tons or from 8000 to 10000 bbls. (*b*) Barges:—The dimensions of which are:—

Length .....135-Ft.
Width .....26-ft.
Depth .....7½-Ft. to 8-ft.

Carrying capacity about 500 tons or about 5000 bbls. The major portion of the coal so shipped into the State of Louisiana (I should say about 90%) is shipped in the type of craft described as coal boats.

Answer to sixth interrogatory. The coal sold by the complainant company in the State of Louisiana, is sold to the following described trade. A large amount is sold and delivered to railroads, the method of delivery is f. o. b. cars on the tracks of the railroad companies pur-

chasing the same and is sold by the ton based upon the weights of the scales of the railroads, purchasing the same.

A large percentage is sold and delivered to the steamship trade as "bunker" coal. The method of delivery is, trimmed in the bunkers of the steamships, and is sold by the ton.

A certain percentage of the sales is to what is known as "sugar" Planters" and "rice planters" trade, which is delivered from the boat or barge to the planter on his plantation along the banks of the Mississippi River in the State of Louisiana. The sales to this trade are made by the barrel and where a full boat load is sold, settlement is made by a gauge measure. When sold in smaller quantities settlement is sometimes made by gauge measure by having a re-gauge made of the boat and sometimes by tallying the wheelbarrows in which the coal is transferred from the barge to the bank, the capacity of the wheelbarrows being arrived at either by weight or by measure. The coal sold to what is known as "dealer" trade is the only coal which is sold for re-sale by the dealer. The coal sold to the dealer is sold by the boat load and settled for by the gauge measure. The dealer in turn sells the coal to the consumer either by the ton or by the barrel. Where sold by the ton, 2,000 lbs. constitute a ton; where sold by the barrel, the amount varies according to the grades of coal; forked lump coal for domestic trade being computed at 180 lbs. to the barrel. The custom of supplying the city steam trade is usually by the ton of 2,000 lbs.

54 Answer to seventh interrogatory. The number of coal boats and barges sold by the complainant Company, in the State of Louisiana, from the first day of October, 1899 to the first day of May, 1908, is 7,222 boat loads and 946 barge loads.

Answer to eighth interrogatory. The total number of unbroken and broken packages sold by the complainant Company from October 1st, 1899 to May 1st, 1908, is as follows:

	Broken pkgs.		Unbroken pkgs.		Unbroken pkgs. (plantation).		Total.	
	Boats.	Barges.	Boats.	Barges.	Boats.	Barges.	Boats.	Barges.
Oct. 1, 1899 to Oct. 31, 1900	414	...	225	..	357	..	996	30
Nov. 1, 1900 to Nov. 1, 1901	705	...	167	..	319	..	1191	92
Nov. 1, 1901 to Nov. 1, 1902	722	...	139	..	76	..	937	110
Nov. 1, 1902 to Nov. 1, 1903	647	...	186	..	104	..	937	78
Nov. 1, 1903 to Nov. 1, 1904	293	...	220	..	33	..	546	102
Nov. 1, 1904 to Nov. 1, 1905	528	...	222	..	32	..	782	33
Nov. 1, 1905 to Nov. 1, 1906	608	...	195	..	13	..	816	43
Nov. 1, 1906 to Nov. 1, 1907	374	292	258	48	25	10	657	350
Nov. 1, 1907 to May 1, 1908	181	91	177	17	2	..	360	108
Total	4472	383	1789	65	961	10	7222	946

By broken packages, we mean the coal which is sold from a barge or coal boat which is not sold by the Louisiana State gu*a*ge and by unbroken packages is meant, boats or barges which are sold and settled for by the Louisiana State gauge.

Answer to ninth interrogatory. There is no service, advantage or benefit effected by the gauging of coal or coke, to either the
55 complainant as seller or consumer or to the purchaser of coal or coke when such sales, consumption or purchase is of a broken package or part of a package, boat or barge of such coal or coke and the broken or part packages, boat or barge loads is wholly useless, and the cost of such gauging a taking of property without a compensation therefor. The only benefit where the gu*a*ge is of any service or use is where a full boat or barge load is sold in its original condition to be paid for by the gauge measure.

Answer to tenth interrogatory. The practice of the complai-ant Company in transporting its coal by river from its mines on the Monongahela River, Pennsylvania, to Louisiana, is in fact, about as follows:

The coal boats or barges after being loaded at the mines are first towed by a tow-boat such as are operated on the Monongahela River in lots consisting of two or three boats or barges, to Pittsburgh. From Pittsburg to Louisville, they are towed by a larger type of tow-boat in tows consisting of from 14 to 24 coal boats and barges and in turn they are towed by a still larger type of tow-boat such as are operated on the lower Ohio and Mississippi Rivers in tows ranging from 28 boats and three or four barges to 46 boats and five or six barges, depending upon the size and power of the respective tow boats.

The gauging of coal by the Louisiana State gaugers and the payment therefor with the exception of such coal as is sold in the original package by the full boat or barge load and payment therefor made according to the gauge measure is an unnecessary expense and no benefit whatsoever to either the seller or the buyer of the coal.

(Signed) GEORGE W. THEISS.

56 United States Circuit Court, Eastern District of Louisiana.

No. 18437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
versus
LOUIS KNOP and JOSEPH L. ROCK, Individually and as State Gaugers of Coal and Coke.

Answer of George W. Theiss.

Cross-interrogatories to be propounded to George W. Theiss, residing and doing business in Pittsburgh, in the State of Pennsylvania, witness on behalf of the above-named complainant, to be answered under oath, and the answers thereto to be used, subject to all legal objections, as evidence on the trial of above entitled and numbered cause.

Answer to first cross-interrogatory. It is a fact that each and every boat or barge containing coal or coke shipped by the Complainant

comes into the State of Louisiana, in full boat or barge loads and crosses the State line in full boat or barge loads where said coal or coke is subsequently delivered by said coal or coke boat loads in whole or in part to purchasers for consumption and re-sale in Louisiana.

Answer to second cross-interrogatory. It is a fact that said full boat or barge loads of said coal or coke have been gauged by the defendants in this case and their predecessors in office prior to the institution of this suit, without any objection on the part of the complainant, and with the consent and acquies-ence of the complainant in said gauging in accordance with the statutes of the State of Louisiana.

Answer to third cross-interrogatory. It is a fact that full boat and barge loads of coal have been sold and delivered by the complainant to railroads in Louisiana by ton weight and after said full boat loads of coal have been gauged by the defendants or their predecessors in office.

Answer to fourth cross-interrogatory. The weight of a barrel of coal as it is understood and regarded in the New Orleans market varies from 180-lbs to 200-lbs. 180-lbs. being applied exclusively to domestic coal for family use being what is known as "forked-lump"; from 190 to 200-lbs. is recognized as a barrel for mine run coal or slack coal. The weight of a bushel of coal is 76-lbs.

57 Answer to fifth cross-interrogatory. It takes about 26-1/-3rd bushels of coal to make a ton of 2,000-lbs. It takes about 50-bushels of coke to make a ton of 2,000-lbs. It takes from 10 to 11-1/9-th barrels of coal to make a ton of 2,000-lbs.

Answer to sixth cross-interrogatory. Our coal boats and barges are usually consigned to our agents in New Orleans though in some specific cases the consignment of a certain number of boats or barges are made direct to the purchaser where the purchaser is a dealer.

Answer to seventh cross-interrogatory. The coal used and consumed by our Company in carrying on its business in the City of New Orleans as well as that sold by our Company at retail and delivered from its yards in the city of New Orleans is sold both by the barrel and by the ton. That sold as steam coal is usually sold by the ton of 2,000-lbs. while that sold by the barrel is according to weights ranging from 180-lbs. for forked lump to 200-lbs. for steam coal.

Answer to eighth cross-interrogatory. The size of a coal boat is:

Length	175-ft.
Width	26-ft.
Depth, from 8-ft. to	10-ft.

Carrying capacity from 20,000 to 25,000 bushels, or from 8,000 to 10,000 lbs.

The size of a coal barge is:

Length	135-ft.
Width	26-ft.
Depth, from 7½-ft	8-ft.

Carrying capacity from 12,000 to 14,000 bushels, equal to 4500 to 5000-bbls.

Answer to ninth cross-interrogatory. It is a fact that there are NO known coal mines of any description whatsoever within the State of Louisiana, and it is a fact that no coal is produced or mined within that state but that all coal within the State of Louisiana is shipped either by rail or water from other states of the union particularly Pennsylvania and Alabama.

(Signed) GEORGE W. THEISS.

58 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

I, William T. Lindsey, a commissioner of the District Court of the United States for the said district at the City of Pittsburgh, do hereby certify that the said George W. Theiss witness as aforesaid appeared before me, at the said City of Pittsburgh on the 16th day of May 1908 and being duly sworn according to law deposes and says that the answers made to the said interrogatories and cross interrogatories hereto attached are true and correct. I do further certify that I am not related by blood or marriage to either of the parties to this action and am in nowise interest-d in the event of the suit.

Witness my hand and official seal at the City of Pittsburgh in said district this 16th day of May A. D. 1908.

(SEAL.) (Signed) WM. T. LINDSEY,
United States Commissioner, Western District of Pennsylvania.

59 *Answers of C. H. Van Dyke, with Commissioner's Certificate Annexed.*

Filed *nunc pro tunc* as of Date June 9, 1908.

United States Circuit Court, Eastern District of Louisiana.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
vs.
LOUIS KNOP & JOSEPH L. ROCK, Individually and as State Gaugers of Coal and Coke.

Answer of C. H. Van Dyke.

Interrogatories propounded to C. H. Van Dyke, residing or doing business in Pittsburg, in the State of Pennsylvania, witness on behalf of the above-named complainant, to be answered under oath, and the answers thereto to be used, subject to all legal objections, as evidence on the trial of above entitled and numbered cause.

Answer to first interrogatory. Charlie H. Van Dyke; age 33 years; reside at No. 12 Cohasset Street, Pittsburg, Pennsylvania; was bookkeeper for Advance Coal Company, Branch of the Monongahela

River Consolidated Coal & Coke Company from October 1st, 1899, to April 1st, 1900; and from April 1st, 1900 (at which time all branches of the Company in Pittsburg were moved into the present office, #8 Market Street) to October 1st, 1904, Clerk in the Secretary's and Assistant Secretary's Office appointed Assistant Secretary October 1st, 1904.

Answer to second interrogatory. Complainant began business on October 1st, 1899, with its home office at Pittsburg, Pennsylvania.

Answer to third interrogatory. Complainant is now and has been engaged in the mining of bituminous coal in the Monongahela Valley in Pennsylvania and at De Koven Kentucky, and the selling of same by rail and River from both points of operation. The coal sold by river is taken by the Company's steamers by way of the Ohio and Mississippi Rivers to different points from Pittsburg to New Orleans, inclusive, the most of the business being done in Cincinnati, Ohio, Louisville, Ky., Memphis, Tenn., and New Orleans, La.

60 Answer to fourth interrogatory. I am familiar with the river shipments and sales of the complainants which knowledge is derived from the statements received of the loading of the coal at the mines, the manifests of the steamers' tows which take the coal to the different markets and the account of sales and reports received from the various branches; therefore I can vouch for the correctness of the records as they are kept in my office. As to the coal sold by rail, I am not familiar with this on account of not having any dealing with that part of the business.

Answer to Fifth interrogatory. The coal is taken from the mines by a small steamer—the type as used on the Monongahela River which tows two or three boats or barges—and is brought to Pittsburg and harbored there in various landings until such a time as the stage of water will permit of their being taken down the River to the various markets. The coal is then taken by a larger type of steamer assisted by the smaller steamers to Bellaire, Ohio, by way of the Ohio River and there made up into larger tow—from 17 to 24 boats or barges—to be taken to Cincinnati or Louisville markets. The coal intended for the lower markets and for New Orleans is then taken on by a still larger type of steamer in a tow of from 28 to 46 boats or barges, according to the size of the Steamer. The craft which are known as boats the size being 26′ X from 8′ to 12′ deep, contain from 8,000 to 12,000 barrels of coal; the craft which are known as barges, which are a much more durable craft than boats, are 26′ X 135′ X from 7′ to 8′ deep and contain 5,000 to 6,000 barrels of coal. The boats contain about 800 to 1200 tons, and the barges from 500 to 600 tons, net.

Answer to sixth interrogatory. The coal shipped and transported to the State of Louisiana is sold there to Railroads, Steamships, Rice and Sugar planters and the Domestic Trade, and some to dealers for re-sale.

Answer to seventh interrogatory. The number of boats and barges of coal sold in the State of Louisiana from Oct. 1st, 1899, to May 1st, 1908, is as follows:

61

Oct. 1st, 1899	to	Oct. 31st,	1900	996	boats	30	barges
Nov. 1st, 1900	"	Nov. 1st,	1901	1191	"	92	"
" 1st, 1901	"	" 1st,	1902	937	"	110	"
" 1st 1902	"	" 1st,	1903	937	"	78	"
" 1st, 1903	"	" 1st,	1904	546	"	102	"
" 1st, 1904	"	" 1st,	1905	782	"	33	"
" 1st, 1905	"	" 1st,	1906	816	"	43	"
" 1st, 1906	"	" 1st,	1907	657	"	350	"
" 1st, 1907	"	May 1st,	1908	360	"	108	"

Answer to eighth interrogatory. The coal sold in the State of Louisiana in broken and unbroken packages from October 1st, 1899 to May 1st, 1908 are as follows:

	Broken pkgs.		Unbroken pkgs.		Unbroken pkgs. (plantation).		Total.	
	Boats.	Brgs.	Boats.	Brgs.	Boats.	Brgs.	Boats.	Brgs.
Oct. 1, 1899 to Oct. 31, 1900	414	...	225	..	357	..	996	30
Nov. 1st, 1900 to Nov. 1st, 1901	705	...	167	..	319	..	1191	92
Nov. 1st, 1901 to Nov. 1st, 1902	722	...	139	..	76	..	937	110
Nov. 1st, 1902 to Nov. 1st, 1903	647	...	186	..	104	..	937	78
Nov. 1st, 1903 to Nov. 1st, 1904	293	...	220	..	33	..	546	102
Nov. 1st, 1904 to Nov. 1st, 1905	528	...	222	..	32	..	782	33
Nov. 1st, 1905 to Nov. 1st, 1906	608	...	195	..	13	..	816	43
Nov. 1st, 1906 to Nov. 1st, 1907	374	292	258	48	25	10	657	350
Nov. 1st, 1907 to May 1st, 1908	181	91	177	17	2	..	360	108
Total	4472	383	1789	65	961	10	7222	946

62 By *broken packages* I mean any which are sold by weight or by tallying the amount unloaded therefrom by wheelbarrow or by box, and sold in that way. The *unbroken packages* are those which are sold by the boat or barge load by gauge measurement.

Answer to ninth interrogatory. I think that the gauging of what is known as a *broken package* is entirely useless to either the seller or consumer, as the same is not used by either party in making the settlement.

Answer to tenth interrogatory. I know of none.

(Signed) CHARLES H. VAN DYKE.

United States Circuit Court, Eastern District of Louisiana.

63 No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
vs.
LOUIS KNOP & JOSEPH L. ROCK, Individually and as State Gaugers of Coal & Coke.

Answer of Charlie H. Van Dyke.

Cross-interrogatories propounded to Charlie H. Van Dyke, residing or doing business in Pittsburg, in the State of Pennsylvania, witness on behalf of the above-named complainant, to be answered under oath, and the answers thereto to be used, subject to all legal objections, as evidence on the trial of the above entitled and numbered cause.

Answer to first cross-interrogatory. Yes.

Answer to second cross-interrogatory. I do not know of any.

Answer to third cross-interrogatory. Yes.

Answer to fourth cross-interrogatory. The weight of a barrel of coal is approximately 200 pounds. The weight of a bushel of Youghiogheny Coal is approximately 76 pounds.

Answer to Fifth cross-interrogatory. A net ton of coal contains 26¼ bushels; a net ton of coke contains 50 bushels. A net ton of coal contains 10 barrels; a net ton of coke contains 19.2 barrels.

Answer to sixth cross-interrogatory. A very small proportion of the boats and barges of coal sold in Louisiana is consigned to individuals; the balance is used for stock.

Answer to seventh cross-interrogatory. Coal sold by retail in the City of New Orleans is sold by weight.

64 Answer to eighth cross-interrogatory. The package known as a boat is 26′ X 175′ X from 8′ to 12′ deep and contains from 8,000 to 12,000 barrels, or about 21,000 to 32,000 bushels. The package known as a barge is 26′ X 135′ X from 7′ to 8′ deep and contains about 5,000 barrels or about 13,000 bushels.

Answer to ninth cross-interrogatory. I am not familiar with the products of the State of Louisiana.

(Signed) CHARLES H. VAN DYKE.

65 UNITED STATES OF AMERICA.
Western District of Pennsylvania, ss:

I*m* William T Lindsey, a commissioner of the District Court of the United States for the said district, at the City of Pittsburg, do hereby certify that the said C. H. Van Dyke witness as aforesaid, appeared before me, at the said City of Pittsburg, on the 16th day of May 1908, and being duly sworn according to law deposes and says that the answers made to the said interrogatories and cross-interrogatories hereto attached are true and correct. I do further

certify that I am not related by blood or marriage to either of the parties to this action and am in nowise interested in the event of the suit.

Witness my hand and official seal, at the City of Pittsburg in said district, this 16th day of May A. D. 1908.

[SEAL.] (Signed) WM. T. LINDSEY.
United States Commissioner,
Western District of Pennsylvania.

66 *Answers of Thomas A. Rowand, with Commissioner's Certificate Annexed.*

Filed *nunc pro tunc* as of Date June 9, 1908.

United States Circuit Court, Eastern District of Louisiana.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
versus
LOUIS KNOP & JOSEPH L. ROCK, Individually and as State Gaugers of Coal and Coke.

Answer of Thomas A. Rowand.

Interrogatories to be propounded to Thomas A. Rowand, residing or doing business in Pittsburg, in the State of Pennsylvania, witness on behalf of the above-named complainant, to be answered under oath, and the answers thereto to be used, subject to all legal objections, as evidence on the trial of above entitled and numbered cause.

Answer to first interrogatory. My full name is Thomas A. Rowand; my age fifty-four years; my residence Bellevue, Penn'a; my occupation Auditor of the Complainant Company since date of its organization, October 1st, 1899.

Answer to second interrogatory: The Complainant began business October 1st, 1899; its principal or home office is in the City of Pittsburg, State of Pennsylvania.

Answer to third interrogatory. Mining and shipping Bituminous coal; operating mines in the Monongahela Valley, State of Pennsylvania and at DeKoven, State of Kentucky; coal loaded in barges and boats at its mines and towed South by the Complainant's steamboats. Coal is also loaded on railroad cars at its mines for the North, the North-West and for local consumption.

Answer to fourth interrogatory. I am familiar with the shipments to and sales of coal in the State of Louisiana. This familiarity, however, is derived from the records of the business of Complainant. These records comprise reports of loading of the
67 boats and barges at the mines, steamboat manifests showing movements of the boats and barges from the mines to the

harbors in the South; the harbor report showing the holding of the boats and barges and account. Sales showing the final disposition of the coal in the boats and barges on which is shown number of the boat or barge, the grade of coal, the guage measurement in barrels supported by railroad weights of cars into which the coal was loaded when sold at railroad weights.

Answer to fifth interrogatory. Coal is shipped to Louisiana in boats and barges via the Monongahela, Ohio and Mississippi Rivers. The boats are twenty-six feet wide, eight to twelve feet deep and one hundred seventy-five feet long. The barges are twenty-six feet wide, eight feet deep and one hundred thirty-five feet long. These are inside measurements. The capacity of boats runs from eight thousand to twelve thousand barrels or from eight hundred to one thousand two hundred net tons; the barges run from five thousand to six thousand barrels or from five hundred to six hundred net tons.

Answer to sixth interrogatory. The coal shipped to the State of Louisiana is sold to railroads, to steamships, to rice and sugar-planters and to sugar refineries through our New Orleans agents and direct to wholesale coal dealers for re-sale.

Answer to seventh interrogatory. The number of coal boats and barges of coal sold by the Complainant in the State of Louisiana yearly beginning October 1st, 1899 to May 1st, 1908 was 7,222 coal boats and 946 coal barges, according to our records.

Answer to eighth interrogatory. The number of coal boats and barges sold, whole or broken, during each year is, according to our records, as follows:

68 *Coal Sold in Louisiana.*

	Broken pkgs.		Unbroken pkgs.		Unbroken pkgs. (plantation).		Total.	
	Boats.	Barges.	Boats.	Barges.	Boats.	Barges.	Boats.	Barges.
Oct. 1, 1899 to Oct. 31, 1900	414	...	225	..	357	..	996	30
Nov. 1, 1900 to Nov. 1, 1901	705	...	167	..	319	..	1191	92
Nov. 1, 1901 to Nov. 1, 1902	722	...	139	..	76	..	937	110
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Nov. 1, 1907 to May 1, 1908	181	91	177	17	2	..	360	108
Total	4472	383	1789	65	961	10	7222	946

By a broken package, coal boat or coal barge, I mean one that has been sold by weight or measurement other than guage, *i. e.*, box or wheel-barrow.

Answer to ninth interrogatory. I do not know of any service, advantage or benefit by *gua*ging of coal or coke to either the Complainant or to the purchaser of coal and coke excepting where the purchaser desires to settle on the *gua*ger's' estimate.

Answer to tenth interrogatory. Not being personally familiar with the handling of coal boats and barges in the State of Louisiana, I cannot suggest anything which may be of benefit or advantage to the parties to this cause.

(Signed) THOMAS A. ROWAND.

69 United States Circuit Court, Eastern District of Louisiana.

No. 13437.

THE MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY

versus

LOUIS KNOP and JOSEPH L. ROCK, —— of Coal and Coke.

Answer of Thomas A. Rowand.

Cross-interrogatories to be propounded to Thomas A. Rowand, residing or doing business in Pittsburgh in the State of Pennsylvania, witness on behalf of the above-named complainant, to be answered under oath, and the answers thereto to be used, subject to all legal objections, as evidence on the trial of above entitled and numbered cause.

Answer to first cross-interrogatory. Yes.

Answer to second cross-interrogatory. I was not aware of any objections prior to the institution of this suit.

Answer to third cross-interrogatory. Yes.

Answer to fourth cross-interrogatory. The weight of a barrel of coal is two hundred pounds, approximately; the weight of a bushel of coal is seventy-six pounds, approximately.

Answer to fifth cross-interrogatory. It takes about twenty-six and three tenths bushels of coal to make one short ton; about fifty bushels of coke to make one short ton; and about ten barrels of coal to make one short ton and about nineteen and two tenths barrels of coke to make one short ton.

70 Answer to sixth cross-interrogatory. Coal boats and barges are consigned to our agents in New Orleans, and a small portion to wholesale coal dealers.

Answer to seventh cross-interrogatory. The reports of coal sold at retail and delivered from our yards in the City of New Orleans indicate that each load is weighed on the scales and sold by weight and where customers call for a certain number of barrels, they furnish them one hundred and eighty pounds of lump coal per barrel.

Answer to eighth cross-interrogatory. The size and measurement of the packages and receptacles used for delivering coal within the State of Louisiana, is as follows: Coal boats are 26 feet wide, 8 to 12

feet deep and 175 feet long, their capacity runs from 8,000 to 12,000 barrels and from 20,000 to 31,000 bushels. The barges are 26 feet wide, 8 feet deep and 135 feet long; their capacity runs from 5,000 to 6,000 barrels and from 13,000 to 15,000 bushels.

Answer to ninth cross-interrogatory. To the best of my knowledge, there is no coal mined in the State of Louisiana.

(Signed) THOMAS A. ROWAND.

71 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

I, William T. Lindsey, a commissioner of the District Court of the United States for the said district, at the City of Pittsburgh, do hereby certify that the said Thomas A. Rowand, witness as aforesaid, appeared before me, at the said City of Pittsburgh, on the 16th day of May 1908, and being duly sworn according to law deposes and says that the answers made to the said interrogatories and cross-interrogatories hereto attached are true and correct. I do further certify that I am not related by blood or marriage to either of the parties to this action and am in nowise interested in the event of the suit.

Witness my hand and official seal, at The city of Pittsburgh in said district, this 16th day of May A. D. 1908.

[SEAL.] (Signed) WM. T. LINDSEY,
United States Commissioner, Western District of Pennsylvania.

72 *Testimony of Paul M. Schneidau, Robert J. Whann, Elmer E. Wood, Robert W. Wilmot, and Frank S. Walsh.*

Offered by Complainant and Filed June 9, 1908.

United States Circuit Court, Eastern District of Louisiana.

No. —.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE CO.
vs.
JOSEPH L. ROCK and LOUIS KNOP, Individually and as State Coal Gaugers.

Testimony Taken in the Above Numbered and Entitled Cause, on Behalf of Complainant, on the 1st, 2nd, and 8th Days of June, 1908, Before Henry J. Carter, Esq., U. S. Commissioner.

Appearances.

Mr. Charles S. Rice, for complainant.
Mr. E. H. McCaleb, Jr., for defendants.

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73 PAUL M. SCHNEIDAU, witness, sworn and examined on behalf of complainant, testified as follows:

Direct examination.

By Mr. RICE:

Q. What is your name?
A. Paul M. Schneidau.
Q. You are one of the agents of the Monongahela River Consolidated Coal and Coke Company, the complainant in this suit?
A. Yes sir.
Q. Your office is where?
A. 315 Carondelet street.
Q. Your business as such agent is to do what?
A. Is to sell coal.
Q. Where does the coal that you sell come from?
A. From Pittsburgh.
Q. How does it arrive?
A. It is towed down in boats by tow-boats, in coal boats and barges
Q. What are the ordinary dimensions, and quantity of coal in coal boat such as you refer to?
A. The coal boat holds from 950 to 1000 tons.
Q. How many barrels is that equivalent to?
A. From 9500 to a little over 10,000 barrels.
Q. Now, the dimensions of the boat or barge; how long, how wide and how deep?
A. 170 feet long, 26 feet wide and about 9½ feet deep; that is about the average.
Q. You sell coal in the capacity of agent?
A. As agent, yes sir.

74 Q. Please explain to us whether you sell that coal by the boat load or package or by the broken boat load or broke package?
A. Part of my sales are by the boat load and another part are by the ton or broken package.
Q. How long have you been such agent?
A. Since 1900.
Q. This company was organized the first of October, 1899?
A. In 1899.
Q. You have been in this capacity ever since then?
A. Yes sir.
Q. To whom do you sell unbroken or entire packages?
A. To the United Fruit Company.
Q. Can you tell us in what quantities you have sold to the United Fruit Company, say since the first of January, 1904?
A. I have averaged about 90 odd boats a year.
Q. I have a statement furnished by your office, which I show you do you know whether that statement is correct?
(Counsel hands witness statement referred to and witness examines same.)
A. Yes sir, that statement is correct according to the books.
Q. It shows how many unbroken boat loads were sold to th

United Fruit Company during the year 1904 to have been how much?

A. 1904; 73 boats, 20 barges,
1905; 73 boats,
1906; 92 boats, 4 barges,
1907; 90 boats, 29 barges,
1908; 50 boats, up to the 31st of May.

Q. That coal is sold by the boat load, and how are the
75 quantities ascertained?

A. By the state gaugers.

Q. In other words, it is sold by the state gauge measurement; the state gaugers are the defendants in this suit?

A. Yes sir.

Q. You use certificates?

A. Yes sir.

Q. Please tell us whether you sell any other coal by the unbroken package?

A. Yes sir, I sell to the Southern Pacific Company.

Q. I say by the unbroken package?

A. I sell them by the unbroken package, the Southern Pacific Company, and some other sundry steamers.

Q. How many unbroken packages do you sell them in the course of a year?

A. They average about 60 or 75 boat loads a year.

Q. That is the Southern Pacific road?

A. And other steamers.

Q. You sell that by the boat load?

A. No sir, I sell——

Q. Then notice the question I ask you; I asked you to whom besides the United Fruit Company you sold coal by the unbroken boat load?

A. I don't sell any other.

Q. You have stated you sell coal to the Southern Pacific Railroad Company; how do you sell coal to them?

A. By weight.

Q. How is that coal delivered and weighed?

A. It is delivered, some of it by wheelbarrows and some by machinery, and weighed as it is put on board of the steamships.

76 Q. Then the coal you sell to steamships, that is sold how, by weight or measure?

A. By weight.

Q. I understand that it is delivered to the steamships of the Southern Pacific line?

A. And other steamships.

Q. I am speaking of the Southern Pacific?

A. Yes sir, but not all of it, not 65 boats.

Q. I am only speaking of the Southern Pacific Railroad Company and the Southern Pacific Steamship Line?

A. They average about 60 boats a year, the Southern Pacific.

Q. But all the 60 boats a year I understand are sold by weight?

A. Yes sir

Q. How is it delivered? You say you sell 60 to 65 boat loads. Do you sell it by the boat load or deliver it as it is ordered?

A. I sell it by weight, as it is ordered, by the ton.

Q. Is it ordered by the boat load?

A. No sir, it is ordered by the ton.

Q. Just describe how you make your deliveries?

A. The steamship orders so many tons of coal and we go alongside with the boat and we put that amount of tons on board the ship.

Q. Now to what other persons do you sell coal?

A. We sell coal by retail from our yards.

Q. How many yards that are selling retail coal have you?

A. I have two, one on the levee between Race and Robin and the other on Barracks between Decatur and Chartres.

Q. How is the coal sold from those yards?

A. By weight.

77 Q. Please tell us what if any purpose is served by the gauging of coal by the state coal gaugers whereby they ascertain the number of barrels there are in a coal boat in those cases where you sell the coal as you have stated in broken packages or by weight?

A. There is no service at all; we do not take any account of the gaugers.

Cross-examination.

By Mr. McCaleb:

Q. You say that you are one of the agents of the Monongahela River Consolidated Coal and Coke Company?

A. Yes sir.

Q. What is the Monongahela River Consolidated Coal and Coke Company?

A. It is a corporation under the laws of Pennsylvania.

Q. Is not that concern commonly known as the coal trust?

A. I do not know whether it is or not.

Q. Now isn't it? Don't you know it is commonly known as the coal trust?

A. I do not think it is known as the coal trust; it is known as the Monongahela River Consolidated Coal and Coke Company.

Q. Isn't it generally known as the coal trust?

A. I do not think so.

Q. When were you appointed an agent of the Monongahela River Consolidated Coal and Coke Company?

A. In 1899.

Q. That is when it was organized?

A. Yes sir.

Q. Before that time what was your business?

A. I was in the coal business.

78 Q. From whom did you buy your coal then?

A. From my partner, John A. Wood.

Q. He was engaged in business in Pittsburgh, Pa.

A. Yes sir.

Q. And the coal you then bought was purchased by you from your firm?

A. Yes sir.

Q. You were the agent of your firm here in Louisiana?

A. I was a partner in the firm.

Q. And you sold coal that was shipped from Pittsburgh here to persons in Louisiana?

A. Yes sir.

Q. Now, when you received coal during your partnership, or prior to October, 1899, did you require the gauge of that coal by the state gaugers of coal?

A. We did.

Q. Did you sell coal in what you term an unbroken package prior to October, 1899?

A. I did.

Q. Didn't you require that all the coal that you received should be gauged up to October, 1899?

A. We did, at that time, yes sir.

Q. Now, how many agents has the Monongahela River Consolidated Coal and Coke Company here in New Orleans and in Louisiana?

A. In New Orleans there are four; that is all that are in Louisiana that I know of now.

Q. Four agents?

A. Yes sir.

Q. Isn't it a fact that the aggregate percentage of coal that is shipped from Pittsburgh to Louisiana for disposition and sale by
79 the Monongahela River Consolidated Coal and Coke Company is more than any other coal concern?

A. Yes sir.

Q. Isn't it a fact that they ship at least 90% of the coal that is shipped into Louisiana?

OBJECTION.—Mr. RICE: I will object to the course of the examination and give notice that I shall ask to have it struck out on the ground that it is wholly irrelevant and is not covered by any pleadings at issue—this objection to cover all testimony on the same line.

A. I do not know exactly the percentage, but I know that they ship most of the coal that comes down here from Pittsburgh.

Q. Now take in 1907, for instance—last year—do you know of and other coal company that shipped coal from Pittsburgh, or the Pennsylvania district, or any other coal producing state, into the state of Louisiana?

A. I think there is some shipped by C. Jutte and Company.

Q. From what state was that?

A. I think that came from Pennsylvania or West Virginia.

Q. C. Jutte and Company?

A. Yes sir.

Q. Are they in any way connected with the Monongahela River Consolidated Coal and Coke Company?

A. They do not exist any more.

Q. C. Jutte and Company do not exist any more?
A. No sir.
Q. Now how much was shipped by C. Jutte and Company, do you know?
A. I cannot tell you.
80 Q. Now, the year 1906, did C. Jutte and Company ship any coal here?
A. Yes sir.
Q. That is the only firm outside of the Monongahela River Consolidated Coal and Coke Company, in 1906 and 1907, that shipped coal into Louisiana?
A. To my knowledge that is the only one.
Q. You spoke of broken packages, what do you mean by broken packages?
A. We take a boat and go to one ship and put 200 tons on board of that ship, and then come back and go to another steamship and put 50 tons on that ship and come back and give somebody else 40 tons, and then another person 150 tons, etc.
Q. You say that a boat load of coal contains how many tons?
A. From 950 to 1000 tons.
Q. Now if you would sell me 1000 tons of coal, would you not sell me the whole boat load of coal?
A. If you wanted it by the ton I would have to weigh it out to you.
Q. I want to get a boat load.
A. I might only get 950 tons in a boat load.
Q. Suppose I wanted to buy 1000 tons?
A. If the boat only contained 950 tons I would give you 50 tons more.
Q. That is what you call a broken package?
A. Yes sir.
Q. You say you sell coal to the United Fruit Company, how do you sell that coal, by the ton or by the weight?
A. By the gauge.
Q. Do they demand of you a gauge?
A. Yes sir.
Q. What gauge?
81 A. The Louisiana State Gauge.
Q. You sell coal, you say, to the Southern Pacific and these steamships here by weight?
A. By the ton.
Q. You say it is delivered in wheelbarrows to these steamers?
A. And by machinery—coal elevators.
Q. How is it weighed?
A. It is weighed by the machine; it is scaled on the machine.
Q. Then you say also that you sell coal by retail from the yards of the Monongahela River Consolidated Coal and Coke Company?
A. Yes sir.
Q. If I would go to you and buy from you say one ton of coal, how would you deliver that ton of coal to my residence?
A. I would put it in a cart—order it and put it in a cart and send it to your residence.

Q. Do you sell by the barrel?
A. Some lump coal is sold by the barrel, and others are sold by the barrel.
Q. Isn't it a fact that all lump coal sold by retail here in the city is sold by the barrel?
A. Yes sir, 180 pounds to the barrel.
Q. And if I was to buy slack coal how much would that barrel weigh. if I bought it by the barrel?
A. 180 pounds.
Q. How many barrels would make a ton?
A. 111/9.
Q. But if I bought ten barrels of coal I would not get exactly a ton would I?
A. No sir.
Q. I would get 1800 pounds?
82 Yes sir.
Q. Now the coal you sell to the Southern Pacific, how is that coal settled for by you to your company and what means have you of arriving at the correctness of the weight?
A. We take the Pittsburgh measure.
Q. What do you mean by that?
A. Their weights.
Q. Pittsburgh measure, do you do the same thing as from the coal sold from your yards?
A. Exactly.
Q. What is the Pittsburgh weight?
A. That I do not know; they weigh it as they put it in there and they let us know what it is.
Q. Who weighs it?
A. Parties up there.
Q. Well, is not that same coal sent to you with the weights along with it?
A. They send us the certificates, yes sir.
Q. Have you got any certificates, or a sample of their certificates?
A. No sir.
Q. I would ask you to produce one of them?
A. I have not any with me?
Q. You have them, have you not?
A. Yes sir.

Mr. RICE: You bring me one and I will hand it to the counsel.

Q. Would not the manifest tell the Pittsburgh weight?
A. No, I do not think it would.
Q. What does the manifest show?
83 A. It shows the number of boats, that is all.
Q. That is all it shows?
A. That is all I think it shows.
Q. Have you got any of those manifests?
A. Mr. Whann may be able to produce those; he gets the manifests.
Q. This coal you sell to the Southern Pacific, and also the coal

from your yards, how is this coal taken to account when placed in your yards; that is to say, how do you credit the same, by the gauge or weight; if by the weight, how do you arrive at the weight of each identical boat?

A. I tell by the certificates.

Q. You say you get the certificate of the weight from Pittsburgh?

A. Weight and measure both.

Q. How do you arrive at the weight of each identical boat?

A. Well, the certificate shows the boat in bushels and barrels.

Q. It shows the weight in bushels and barrels?

A. Yes sir.

Q. Then that certificate would not only show the weight, but also the gauge?

A. Yes sir.

Q. In that case wouldn't the weight and the gauge check out?

A. What do you mean by checking out?

Q. Is there not a relation between the weight and the gauge if the certificate shows both?

A. Yes sir.

Q. Would not the weight be a check on the gauge and *vice versa*?

A. Yes sir.

Q. Therefore that certificate would show that all these boats that are consigned to you were, before they were loaded in Pittsburgh, or at Pennsylvania points for shipment to Louisiana, that the
84 coal was weighed before being put on the boats and that the coal was gauged after it was put on the boat?

A. I do not know the *modus operandi*, how they loaded or weighed the coal; I cannot tell you that; I never saw it loaded.

Q. Now if some of the coal in those boats that are consigned to you, in which the coal has been weighed in Pittsburgh and gauged there, was taken out of the boats before they reach you, wouldn't your weights show a discrepancy?

A. Yes sir, it would.

Q. And wouldn't it always show a discrepancy in the gauge?

A. Yes sir, certainly.

Q. Have you ever had occasion to have the boats consigned to you regauged?

A. No sir, I have not.

Q. Do you know what regauging is?

A. Yes sir.

Q. What is it?

A. When the boat is run short and the party thinks there is some mistake in the gauge, he would have it regauged.

Q. Who makes this regauging?

A. It is generally done here by the state gaugers.

Q. How can you tell whether the boat requires regauging?

A. That is if you should run short.

Q. In what? In weight, in measure or both?

A. In both weight and measure.

Q. Suppose on the regauging it was discovered that the gauge of the state gaugers was correct, who pays for that regauging?

A. We generally pay for the regauging.

Q. Suppose it turns out that the gauge of the state inspectors was wrong, who pays for the regauging?

85 A. I do not know. I never had any boats regauged so I cannot tell you who pays for that.

Q. But you know what regauging is?

A. Yes sir, it has been done by others.

Q. Did you have any boats regauged before you were agent for the Monongahela River Consolidated Coal and Coke Company?

A. No sir, I never had one.

Q. Do you know whether or not boats have been regauged?

A. Yes sir.

Q. As a matter of fact they have been regauged?

A. Some have been regauged.

Q. Where are these boats gauged by the state inspector?

A. Generally coming down the river.

Q. About where?

A. Anywhere below Vicksburg; I think they come up as far as Vicksburg, Miss. and come down the river.

Q. About where the crossing of the state line is?

A. Yes sir.

Q. Have you ever requested of the state inspectors a certificate of the gauging, a gauge certificate; have you ever requested that from the state inspectors?

A. Yes sir.

Q. Since the filing of this suit have you requested the gauge?

A. Yes sir; I want to explain why I have, because the Fruit Company required it; we sell the Fruit Company by the state gauge, therefore I have to get the state gauger's certificate.

Q. If you would sell a boat load of coal, say a whole boat load, to any person that wants to buy, would you demand a gauging certificate?

A. Do you mean a full boat load of coal?

86 Q. Yes?

A. Yes sir, I would ask for a certificate.

Q. And you would sell it on that certificate?

A. That is if the party required it.

Q. If he did not require it you would not sell it on that certificate would you?

A. I would sell it by weight then.

Q. If a party merely bought a boat load of coal, without requiring a certificate, you would not demand the certificate, would you; there would be no necessity for it?

A. No sir, no necessity for it.

Q. If you were to sell a boat load of coal to any person wouldn't you give them the gauge of that boat?

A. If it was sold by a gauge, yes sir.

Q. You would give him the gauge you say?

A. If it was sold by a gauge.

Q. And in case you would not take the certificate of the state in-

spectors, wouldn't you take the gauge made up there in Pittsburgh by the Company?

A. No sir.

Q. So you would sell the boat without any gauge at all?

A. No, if I sold the boat by gauge I would sell it by certificate of the local state gaugers.

Q. Therefore, there would be necessity for that certificate?

A. Yes sir.

Q. Suppose the coal that is consigned to you in a boat and delivered into your yards in which you have the weight of that coal given you by the Pittsburgh people, or by the Company in Pittsburgh, and it should turn out that that weight was short or that that measurement was short, how would you ascertain the shortness of the weight?

87 A. It would be pretty hard to do because we put a boat load of coal in there and sometimes we don't sell it for six months; we sell it in small lots, and the yards never get empty, so it is pretty hard to tell unless we empty the yard, whether there is any shortage or not.

Q. Let me understand that; suppose you would get a boat load of coal that would be certified to you by the Pittsburgh people, or the Monongahela River Consolidated Coal and Coke Company, to weigh, we will say 1000 tons, and in retailing that coal out you should find it weighed only 800 tons, how would you account to the Pittsburgh people for the difference?

A. As I explained to you, it would be pretty hard to tell that because our coal yards never get empty.

Q. Don't you render some account?

A. Yes sir, we render an account for every barrel sold.

Q. If it should appear that you sold less barrels than that certified to you, how would you account for the difference?

A. I would make a claim against them.

Q. In other words, they would in that case consign coal weighing 1000 tons to you and you would sell 900, you would have a claim against them as a set-off of 100 tons?

A. I would.

Q. Would that also apply to the gauge according to the certificate given to you by the Pittsburgh people or the Monongahela River Consolidated Coal and Coke Company?

A. Yes sir.

Redirect examination.

By Mr. RICE:

Q. Do you profit or lose personally by coal over-running
88 in measurement in the yard, or under-running?

A. Not a cent.

Q. It is simply a question of bookkeeping between your agency and the Pittsburgh company?

A. Yes sir.

Q. Whose coal is it all the time?

A. The Monongahela River Consolidated Coal and Coke Company's.

Q. You were asked the question on cross-examination whether prior to 1899 you had not required the coal gaugers to gauge your coal; exactly just what you mean by that?

A. We took the coal gauger's certificate in 1899.

Q. You insisted on their gauging all your coal, is that what you mean?

A. Yes sir, it was all gauged by the state gaugers prior to that and I demanded certificates.

Q. What I am trying to get at is the use of the word "require" which was put to you. Why has the coal which you sell by broken packages been gauged by the state coal gaugers during the several years when you say it was of no use to you.

A. That is the only gauge we used to get when I was with John A. Wood; we never got any Pittsburgh gauges.

Q. Do I understand you to say that you insisted on having the coal gauged which you proposed to sell in broken packages when that was no use to you?

A. Prior to 1899 we did it.

Q. Have you ever had in your charge the business of having the coal of the Monongahela River Consolidated Coal and Coke Company gauged?

A. No sir.

Q. Who has?

89 A. R. J. Whann.

Q. Previous to 1899 who had charge of it?

A. The various coal companies.

Q. Then when you speak of this requirement before that, it was the requirement of the various coal companies then doing business?

A. Yes sir.

Q. Do you sell any coal by the boat load without complying with the statutes of Louisiana?

A. I do not.

Q. With respect to gauge?

A. I do not.

Recross-examination.

By Mr. McCaleb:

Q. You say that this loss in weight, whatever it may be, between the weight certificate to you by the Pittsburgh people, or the gauge of the Pittsburgh people and the weight and gauge of that coal which you sell, is of no personal loss to you?

A. No sir.

Q. Now if it should appear that this weight was short whose loss would it be?

A. The Monongahela River Consolidated Coal and Coke Company.

Q. They would lose it?

A. They would lose it.

Q. Why does the Monongahela River Consolidated Coal and Coke Company gauge its coal in the Pittsburgh district and weigh that coal?

A. I do not know.

Q. You don't know why?

90 A. No sir, I do not know what their reason is.

Q. Don't you take an inventory of your stock at the end of each year or month?

A. Yes sir.

Q. How do you take the inventory of your stock on hand at the close of each year?

A. We average the coal in the yard and average the coal in the boats.

Q. How do you average that?

A. Just by looking at it and calculating what we have taken out and what we have put in, and the difference would be what we ought to have.

Q. And then you make your returns to the Pittsburg people?

A. Yes sir.

Q. And if those returns should show a loss in weight or gauge, why that amount would be upon them?

A. Yes sir.

Q. How would they lose this, wouldn't that show that somebody had taken that coal, part of that coal, either in transit or from your yards?

A. I do not know, there has been very little difference in the coal.

Q. But such loss is possible, is it not?

A. Yes sir.

Q. And isn't such loss a fact?

A. It may be possible.

Q. And isn't such loss a fact?

A. There is very seldom any loss, there is very seldom any shortage.

Q. Is there any difference between the state gauge and the Pittsburgh gauge?

91 A. Not a great deal, there may be a little, but not much.

Q. How does the state gauge agree with the Pittsburgh gauge?

A. They are pretty nearly alike.

By Mr. RICE:

Q. When it comes to selling a broken package, either by weight or by measure, does either the gauge of the state coal gaugers of Louisiana, or the gauge or weight of that coal in Pittsburgh, serve any purpose whatsoever?

A. None at all; we sell it by our own weights.

OBJECTION.—Mr. MCCALEB: I want to object to the question and answer on the ground that it is an opinion of the witness and a conclusion of a fact and not a statement of a fact.

Q. I will put the question in another shape; when you sell coal in Louisiana in quantities less than a full package, what office or what assistance is to be derived either by gauging the coal by the boat load by the state gaugers of Louisiana, or the fact that it has been gauged or weighed in Pittsburgh?

A. None at all.

OBJECTION.—Mr. MCCALEB: I object to that question and answer also on the ground that it is a statement of the witness's conclusion or opinion.

92 R. J. WHANN, witness, sworn and examined on behalf of complainant, testified as follows:

Direct examination.

By Mr. RICE:

Q. What is your name?

A. R. J. Whann.

Q. You are one of the agents of the Monongahela River Consolidated Coal and Coke Company in New Orleans, and have been since when?

A. 1899.

Q. In other words, ever since the company has been in existence?

A. Yes sir.

Q. Your business is selling coal for that company, I suppose?

A. Yes sir.

Q. What is the character of the sales made by you, whether in whole packages, meaning full boat loads, or unbroken packages, meaning part of the contents of a coal boat or barge?

A. I sell both ways.

Q. In what trade do you sell the unbroken packages?

A. Well, in railroad contracts, such as the Southern Pacific Railroad Company; I did sell to the American Sugar Refinery.

Q. How do you sell to the Southern Pacific Railroad Company, by boat loads or otherwise?

A. I sell by the ton.

Q. Who ascertains the number of tons you deliver?

A. The coal is weighed on a scale of the railroad company by their employés and we take their weights.

Q. How is that coal delivered by you?

93 A. We take the coal by machinery from the coal boat and dump it into the cars of the railroad company and it is weighed by them at Algiers.

Q. It is weighed at Algiers, in your boat or in the cars?

A. In the cars.

Q. Do you sell any coal to the Southern Pacific or any other railroad company by the boat load?

A. Well, not generally; I never sold the Southern Pacific Company any by the boat load.

Q. Do you sell it to any other railroad company by the boat load?

A. No sir, it is all sold by the ton.

Q. In all cases?
A. Yes sir.
Q. To what persons or parties do you sell coal by the boat load; that is, do you sell any unbroken packages?
A. We sell it to other coal dealers who buy it.
Q. I am speaking of yourself?
A. Yes sir, as agent of the company I sell to other coal dealers who buy it.
Q. To whom do you sell?
A. I sell to the waterworks company.
Q. Who else?
A. I sell to the Union Oil Company, to different people; just now we are not selling very much; I sell to sugar planters; I sell to sawmills sometimes, White Southern Lumber Company—sell them some.
Q. Do you make any sales to the United States Government?
A. Yes sir, I sell them by the boat load.
Q. By what gauge or measurement do you sell to the United States Government?
A. I sell by the Louisiana State Gauge measurement to be remeasured by their officer to verify the certificates of the gaugers;
94 it has to be verified by an officer of the United States Government.
Q. Then if the state gauge is found correct they pay it by the state gauge?
A. Yes sir.
Q. And if they do not find it correct they pay by their own measure?
A. Yes sir.
Q. Now, what quantity of coal on an average have you sold to the waterworks company for the last three or four years?
A. I have sold them about four boat loads a year.
Q. And the Union Oil Company?
A. I have not sold them lately—two or three when I did sell them.
Q. How many when you did sell them?
A. Two or three a year.
Q. You say you sell to sugar planters?
A. Yes sir.
Q. The sugar planter's is a peculiar trade, is it not?
A. Yes sir.
Q. A good many of them buy boat loads or several boat loads?
A. Yes sir.
Q. During the last four years what average quantity of boat loads of coal have you sold to sugar planters?
A. Not more than four or five.
Q. Prior to that time was the quantity to sugar planters less or more?
A. Before the discovery of oil in Louisiana the sugar planters all used coal; since the oil has come in, why they use oil.
Q. How long since the sugar planters began to use less coal?
A. Ever since the oil was discovered down here in Beaumont.

Q. About when was that, do you remember?
95 A. No sir, about five or six years ago.
Q. Instead of coal they use what now?
A. Crude oil.
Q. That has made a difference in the quantity of coal which has been consumed by the sugar planters?
A. Yes sir.
Q. Now all that coal which is sold to the waterworks company, or sold by you to the Union Oil Company, and is sold to the sugar planters, by what measurement is it sold?
A. By the Louisiana State Gauge measurement.
Q. There has been no question or dispute on that?
A. No sir.
Q. In what quantity, about how many boat loads of coal has your agency disposed of since the organization of the complainant company?
A. The amount of coal sold yearly——
Q. I offer your statement marked "Exhibit B" and ask if that statement shows practically the quantity of coal handled by your agency during the time mentioned in it?
A. You mean of my sales? This is a list of the entire amount of coal that came here each year.
Q. The exhibit shows the entire quantity of coal that has arrived in Louisiana in barges during the years mentioned, each year from the first of October, 1899 to May 31, 1908? It commenced in October, 1899. What was the quantity of coal that arrived then, during that year?
A. 928 packages.
Q. That was from 1899 to 1900?
A. Yes sir.
Q. Now from the first of October, 1900, to 1901, how many?
A. 1389.
96 Q. The next year?
A. 182.
Q. The next year?
A. 824.
Q. The next year, 1903-04?
A. 1022.
Q. The next year?
A. 721.
Q. The next year, 1905-06?
A. 664.
Q. The next year, 1906-07?
A. 834.
Q. And up to May 31st for 1907-08?
A. 688.
Q. There is a memorandum at the foot of this exhibit reading as follows: "During the year beginning October 1st, 1899, and ending September 30, 1900, R. J. Whann sold 188 boats; 15 of these required gauging"?

A. Those are boat loads of coal I sold; we sold them by actual measurement and on taking to account by my agency.

Q. 15 of these required gauging, what does that mean?

A. That means probably they were boat loads of coal I sold to the waterworks and Edward Irwin, and anybody else I sell to; I cannot——

Q. What I want to get at is this; does it mean or not mean the number of boats you sold unbroken?

A. Yes sir.

Q. Now that left 173 boats that were broken?

A. Yes sir.

Q. And that means what?

A. That means coal I sold by the ton or barrel.

97 Q. There is another memorandum following that; during the same month, in the year 1905-06, 233 boats were sold, 131 required gauging?

A. That is the same explanation.

Q. What do you say with respect to the correctness of this statement?

A. It is made from our books.

Q. Your books are correct?

A. Yes sir.

Mr. RICE: I offer the statement in evidence in connection with the testimony of the witness.

By Mr. McCALEB:

Q. Did you make that statement?

A. It was made by my bookkeeper.

Q. You do not know whether it is correct or not, do you?

A. It is supposed to be correct by my books; I did not make it myself.

Q. Did you go over your books and check it off?

A. My books are audited every six months and they are always found correct.

Q. You don't audit your own books?

A. No sir, an auditor comes here from Pittsburgh.

OBJECTION.—Mr. McCALEB: I object to this part of the statement; my objection is confined to the memorandum at the foot of the statement after the words and figures 7952 packages

By Mr. RICE:

Q. Do you know what the number of packages which you

98 sold to all parties amounts to approximately per year?

A. The number of boat loads vary; the number of packages vary according to the business I am doing.

Q. It varies between what figures?

A. Between 180 and 350 packages.

Q. In other words your sales vary from 180 to 350 packages?

A. They have varied.

Q. What proportion of those are sold in unbroken packages—be liberal in the statement?

A. I suppose 20; 15 or 20 a year. Prior to the introduction of oil, when the sugar planters took coal, it would be more.

Cross-examination.

By Mr. McCaleb:

Q. Before the formation of the Monongahela River Consolidated Coal and Coke Company in October, 1899, how many shippers of coal were there who shipped coal from Pittsburgh to the state of Louisiana?

A. I do not know.

Q. Well, approximately?

A. I should judge 10 or 12, probably 15.

Q. Since that time these companies have ceased doing business here, isn't that a fact?

A. Yes sir.

Objection.—Mr. Rice: I will make note of an objection here and give notice that I shall ask the testimony to be stricken out. This involves not only a question which has just been asked, but all others that have been asked as being entirely irrelevant to
99 the issues of this case.

Q. What has become of these companies?

A. I do not know.

Q. Isn't it a fact that they have all disposed of their business to the complainant company?

A. I do not know that; I know they did dispose of some of their business, but whether they disposed of all or not I do not know.

Q. Prior to October, 1899, what company did you represent?

A. I was in business for my own account?

Q. You owned mines in Pennsylvania?

A. No sir.

Q. How did you buy your coal?

A. From Pittsburgh shippers.

Q. And since that time you have been one of the agents of the Monongahela River Consolidated Coal and Coke Company?

A. Yes sir; I had a Pittsburgh partner prior to that

Q. Now, you say that about 15 or 20 of the boats that are consigned to you require gauging; what do you mean?

A. Not are consigned to me, that are sold by me.

Q. Required gauging?

A. When they are sold to private individuals.

Q. Those boats that were consigned to you would they not require gauging?

A. It depends upon to whom they are sold.

Q. The boats that were shipped to you, all those boats that were consigned to you, didn't they all require gauging; were not they all consigned to you in what you call the unbroken package?

A. No sir, not consigned to me.

Q. How were they consigned?

100 A. To those companies owning the coal.

Q. Were they not consigned to you as full boat loads as agent of the company?

A. No, they are not consigned to me; they are consigned to Wilmot.

Q. They come into your possession as full boat loads, do they not?

A. I handle them through my office.

Q. As full boat loads?

A. No sir, as so many boats of coal.

Q. You do not understand my question; I want to know how you get possession of all these boats; you say you get possession of all these boats and then sell them, either in whole or in part to the different people: is not that correct?

A. The coal companies would consign to W. G. Wilmot and Company and my department has charge of keeping the stock of all the coal belonging to the company that comes consigned to them.

Q. Then you are the stock keeper of the company?

A. Yes sir, that is one of my duties.

Q. As one of the agents of the Monongahela River Consolidated Coal and Coke Company?

A. Yes sir.

Q. When that stock comes to you, in what form or shape or manner does it come?

A. It comes in tow, brought by tow-boats.

Q. In full boat loads?

A. Yes sir, generally full.

Q. Wouldn't all those boats that come into your possession as stock keeper require gauging?

A. No sir.

Q. Why not?

101 A. Because—According to law they have to be gauged, but as to the necessity of gauging they do not require gauging.

Q. Why not?

A. We do not use the gauge.

Q. Why not?

A. Well, I sell the Southern Pacific Company, for instance, 150,000 tons of coal per year; I never sell them a boat load; I sell them 10 or 15 or 20 cars and they pay me by the ton.

Q. Now, for instance, you say there were 15 of those boats or boat loads or packages which you claim required gauging; is it not a fact that all of these 188 boats which came into your possession as stock keeper, beginning October 1st, 1899, and ending September 30, 1900, you used the state gauges in your settlement with the Pittsburgh people?

A. No sir.

Q. Did you use the gauge of the state inspectors for these 15 boats that required gauging in your settlement with the Pittsburgh people?

A. Yes sir.

Q. It is only these 15 boats?

A. Whatever I said, whenever I sell by the package to outside parties.

Q. Now of these 188 boat loads did any of them require regauging?

A. No, none of those.

Q. Or did any others covered by the years of your agency?

A. I very seldom had a regauge.

Q. Have you had any regauging?

A. Yes sir.

Q. What was the purpose of that regauging?

102 A. To see if the state gaugers had not made an error.

Q. In what respect?

A. If the gauge of the state gaugers did not agree with the Pittsburg weight——

Q. Then you have the Pittsburgh weight and gauge given to you and you compare that with the state gauge?

A. On the contrary, I have to send the Louisiana gauge to Pittsburgh generaly to be approved before they allow me to sell coal because there have been so many errors.

Q. Isn't the Pittsburgh gauge made by the Monongahela River Consolidated Coal and Coke Company based entirely on the system of the Louisiana state gauge?

A. No sir.

Q. It is a different gauge?

A. I don't know about it being a different gauge; some coal is gauged that way and some is gauged by weight.

Q. I am not speaking not about gauging by weight, but is it not a fact that those boats that are gauged up there in Pittsburgh, that their gauge is based on the Louisiana state gauge?

A. Some of it, yes sir.

Q. And isn't that gauge according to the rules set forth by the Louisiana state law?

A. Yes sir; that gauging is not done by which to sell coal, it is simply done as a precaution to see that they get the proper gauge and weight.

Q. As a check?

A. Yes sir.

Q. In other words the Pittsburgh gauge is a check on the Louisiana gauge and it is a check on the gauge of the boats as you sell them to different individuals?

A. I sell them to different individuals by the Louisiana

103 state gauge.

Q. And you use the Pittsburgh gauge to check up that Louisiana gauge?

A. No sir.

Q. I mean to say, doesn't the Monongahela River Consolidated Coal and Coke Company do that?

A. Probably they do; some coal is weighed at the mines and on measurement.

Q. Some is weighed and some is measured?

A. Yes sir.

Q. Isn't it all gauged and weighed?
A. I do not think so.
Q. Do you know?
A. No sir.
Q. Have you not got manifests of these boats you receive?
A. Yes sir.
Q. I would like for you to produce those manifests?
A. All right.
Q. Do you take an inventory of your stock at the end of each year, or at what time?
A. We take an inventory every month.
Q. How do you take that inventory?
A. As our yards are scarcely ever empty we take the amount of coal we put in them and take the amount of sales we made out of the yards, and the balance is supposed to be in the yards.
Q. And then you send that inventory on to Pittsburgh or to the Monongahela River Consolidated Coal and Coke Company?
A. Yes sir.
Q. Suppose there should be a difference in weight and a difference in the gauge of the coal held in hand by you between the
104 weight and the gauge of your inventory and that of the Monongahela River Consolidated Coal and Coke Company, whose loss would that be?
A. That would not be any loss; it is all the company.
Q. It would be the company's?
A. They would take it out of one pocket and put it in another.
Q. In other words, suppose the company would ship to you a boat load of coal which contained about 1000 tons or about 10,000 barrels and when you sell that boat load of coal either by weight or by measurement there was a difference, whose loss would that be?
A. In our coal yards we never know, the yards are never empty.
Q. But if there was a loss?
A. I do not know, we have not come to that yet.
Q. Wouldn't it be the loss of the Monongahela River Consolidated Coal and Coke Company?
A. I do not know; it would not be mine.
Q. What is the purpose of the Monongahela River Consolidated Coal and Coke Company having this coal weighed in Pittsburgh and gauged in Pittsburgh?
A. They have to pay the miners by weight and they have to make a measurement somewhere.
Q. What is the purpose of the Monongahela River Consolidated Coal and Coke Company sending you the weight and the gauge of this coal?
A. Well, we settle by that.
Q. Isn't that a check on your settlement?
A. I do not know; we settle this way. The coal that I sell the Southern Pacific, for instance, I pay the company for as many tons as I sell the Southern Pacific out of the boat. If it runs over or runs short it belongs to the company.

105 Q. Therefore the company would be the loser or the gainer as the coal would run over or short?

A. It generally runs about even.

Q. But if it wouldn't run even wouldn't the company be the loser of it?

A. I don't know whether they would be or not; there might be a difference in the measurement.

Q. They would be the loser if there was a difference in the measure or weight, wouldn't they?

A. You take and buy coal by measure and sell it by weight—some coal is heavier than others and a barrel of some coal will weigh a great deal more than a barrel of some other grade, so you cannot check it that way.

Q. Can't you check it by gauge?

A. No sir, all we can do is to give them all that belongs to them, all we sell and all we receive.

Q. Why does the company send to you the weight and the gauge of that coal; that is what I want to know?

A. Because they do, I suppose; I don't know why; I never asked them.

Q. Suppose they were to ship you a boat load of coal that was supposed to contain 1000 tons or say 10,000 barrels, and in selling that boat load of coal either in whole or in part there would be 500 tons and only 5000 barrels of coal——

A. Let me explain to you now why they send those certificates from Pittsburgh; I told you I did not know; I do know——

Q. Answer my question first and then explain.

A. I am answering your question, they would write to me to know what has become of the balance of the coal if such a thing were to occur, but that is not possible.

Q. Why is it not possible?

106 A. To lose 5000 barrels of coal on a boat.

Q. I merely gave that as an example, Mr. Whann?

A. The gaugers themselves in gauging a boat load of coal cannot give exactly the number of barrels; it would run 100, 150 or 180 barrels either one way or the other and these gauge certificates are sent to me to facilitate in settling with these gentlemen, that is, the state gaugers, not these particular inspectors that are gauging now. The inspectors want their money for gauging and I cannot pay the money until the gauges are sent to Pittsburgh to see if they are correct because some very big errors have been made by some of the gaugers, so much so that we had to get them to gauge the coal over again and we found errors, so in order to enable me to settle with these gentlemen quickly I sent these certificates to Pittsburgh to compare with the gauges there and if there is no material difference I pay their bills.

Q. Why do the Pittsburgh people require these certificates of gaugers?

A. They don't require them, the law forces them to take them.

Q. You say if their gauge is erroneous that you require regauging?

A. That is on coal we have sold by the boat load to be settled for by the Louisiana state gauge measurement.

Q. Don't the Pittsburgh people have a gauge of that coal?

A. They have the pit measure.

A. A gauge and a pit measure?

A. Yes sir.

Q. And if the gauge of the Louisiana state inspectors does not tally with their gauge what then do they do?

A. They call on the gaugers to go over their work.

Q. And regauge it.

107 A. Yes sir.

Q. In other words the Louisiana state gauge must check up with the gauge made by the Pittsburgh people?

A. Not at all.

Q. Why not?

A. The Louisiana gauge must be correct.

Q. How can you tell if it is incorrect?

A. By comparing it with what we suppose is correct.

Q. How do you suppose it to be correct?

A. We have a very accurate man we know that gauges it?

Q. An accurate man that gauges it in New Orleans?

A. No sir, in Pittsburgh.

Q. Therefore there is a gauge made by the company in Pittsburgh, a man who gauges this coal, and if the Louisiana state gauge is incorrect you ask for a regauge so as to get the correct gauge of the coal; is not that correct?

A. According to law all coal that we sell by the boat load is sold by the Louisiana state gauge and if the Louisiana state gauge seems to be incorrect I ask for a regauging.

Q. Well, how do you tell whether it is correct or incorrect?

A. Well, I can tell by this gauge certificate I have from Pittsburgh.

Q. You have those certificates in your office?

A. Recently I have gotten them.

Q. I would like for you to produce some of them and please select one as a specimen. When the Louisiana state gauge differs from the Pittsburgh gauge or the gauge of the Monongahela River Consolidated Coal and Coke Company and you would require a regauging, wouldn't you send a local inspector to regauge that boat or that coal with the Louisiana inspectors?

108 A. I have done so.

Q. And suppose it was found out that the Louisiana state gauge was correct, who would pay for that regauging?

A. I would pay for it in all cases; I have to pay the expert.

Q. But if it was wrong would you pay for it?

A. I would have to pay the expert.

Q. But you would not pay the state gaugers for regauging, would you?

A. If the gauge was wrong I would not, no sir.

Q. In other words, in case of a regauging, if the state inspectors'

original gauge was wrong you would not pay the state gaugers for regauging, but you would pay your special inspector?

A. Yes sir.

Q. You have got to pay him at all events?

A. Yes sir.

Q. But if it is correct you would have to pay the Louisiana state gaugers for regauging?

A. Yes sir.

Q. Do you recall any mistakes made by the present Louisiana state inspectors, any cases where coal was ordered regauged?

A. No sir, not particularly.

Q. Now, prior to the institution of this suit, last year, in October or the latter part of 1906, did you require certificates of the Louisiana state gaugers in all cases whether the coal was sold in what you term broken and unbroken packages?

A. I never had to require any gauges, they brought them in.

Q. Didn't you pay, or didn't your company pay for all this gauging whether you sold the coal in broken or unbroken packages?

A. Yes sir.

109 Q. That is, prior to the institution of this suit?

A. Yes sir.

Q. Since that time you only require certificates for coal which you sell in what you call unbroken packages?

A. That is all I require and I pay for that; I also pay under protest for all the others.

Q. Isn't it a fact that you have only paid up to $5000 worth and that there is still some more due?

A. Yes sir.

Q. Do you know about how much?

A. No sir.

Q. Does it not exceed $2000?

A. I think so.

Q. Therefore you have retained, or your company has retained that amount up to the present time until the final disposition of this suit?

A. I do not know. Until I get orders to pay it.

Q. I show you a copy of a letter marked "D-1" and ask you if you received that letter from the Louisiana state gaugers?

(Counsel hands witness letter referred to and witness examines same.)

A. Yes sir.

Mr. McCaleb: I offer the copy in evidence and will substitute the original if so desired.

Q. Has not Mr. Rock, one of the state gaugers, made a verbal demand as contained in that letter?

A. Yes sir, as to when he could get some money. I told him what he could do. I did not refuse to pay him.

110 Q. The sales you have made to the Southern Pacific Company, how were they settled for by you to your company and what means had you of arriving at the correctness of the weight?

A. Well, I had no means. I take the Southern Pacific Company's weight; I have the right to put a man at their scales if I want to, but I don't do it.

Q. You take their weights?

A. Yes sir.

Q. How can you tell whether their weight is correct or not, except what they tell you?

A. I do not know.

Q. Now, as to coal in your yards, how is that settled for to your company and what means have you of arriving at the correctness of the weight?

A. As I put the coal in the yards I take the weights or measures sent me from Pittsburgh and settle by the Pittsburgh measure.

Q. How do you arrive at the correctness of that weight—you take their weight?

A. Yes sir.

Q. Then you sell that coal, do you not?

A. Yes sir, by the barrel or by the ton.

Q. How do you arrive at the correctness of your weight?

A. I have a scale there and a man to weigh it, the scale is inspected by——

Q. Then how is this coal taken into account when placed in your yard, that is to say, how do you credit the same, by weight or gauge, and if by the weight how do you arrive at the weight of each particular boat?

A. By the certificate they send me from Pittsburgh.

Q. Those are the certificates you referred to in your exami-
111 nation, that you say you will produce?

A. Yes sir, prior to this suit they did not send those certificates.

Q. Prior to this suit you did not receive any certificates?

A. No sir.

Q. Why not?

A. I do not know, they never sent them.

Q. Is that a fact that all these boats and barges that come into the state of Louisiana cross the state line in full boat loads?

A. They are expected to, yes sir.

Q. And isn't it a fact that all this coal that comes into the state of Louisiana and crosses the state line in full boat loads is consigned to Mr. Wilmot, the agent of the company?

A. Yes sir.

Q. And how is it turned over to you?

A. They are landed at the different coal landings on the river and a manifest of each tow is sent to me and I keep run of the boats that are taken away.

Q. So that every boat load of coal that is sold by you either by weight or by measure is accounted for by you to the Pittsburgh people?

A. Every boat I sell.

Q. Where other parties sell coal how are the accounts made?

A. They render their accounts to Pittsburgh themselves.

Q. How are those boats turned over to these parties?
A. They come and get them.
Q. On whose order?
A. On their own order, it is the company's coal; they do not give an order, they just go with a tow-boat and take them.
Q. How do you keep stock then?
112 A. I am notified.
Q. Before the institution of this suit did you take or receive a boat load of coal without this boat having been gauged?
A. As agent of the company?
Q. Yes?
A. I would have to receive anything they send.
Q. I mean would you receive it without that boat being gauged according to the laws of the state of Louisiana; would you receive it without that?

OBJECTION.—Mr. RICE: I object to the question on the ground that it is a hypothetical question which is not shown to have any basis of fact. In other words it is not shown that the witness ever did receive any coal during the time stated that had not been gauged.

Q. I mean sell coal without a gauge certificate prior to the institution of this suit?
A. Not for use outside of the company's business.
Q. Prior to the institution of this suit?
A. Yes sir, nor since.
Q. When these coal boats come into the state of Louisiana do you know what boats are to be sold in what you term broken and unbroken packages?
A. I know some of them.
Q. Those that you know of you require gauging?
A. Yes sir.
Q. Those that you don't know of you don't ask for gauging?
A. Not until I make the sale and need the gauges.
Q. Is it not a fact that all these boats are gauged?
113 A. I understand so, I do not know.
Q. But you don't require a certificate or demand a certificate of the inspectors?
A. Not until I need it, where it is sold by the boatload.
Q. Now, for instance, I show you a letter dated April 6, 1908, addressed to The State Coal Gaugers, which reads as follows:

"APRIL 6, 1908.

GENTLEMEN: You may gauge the following boats of coal which arrived in tow of the steamer John A. Wood on April 4th, marked R. C. 10319, 10358, 10432, 10366, to New Orleans.

Yours respectfully,

MONONGAHELA RIVER CONSOLIDATED COAL & COKE CO.
ROBERT J. WHANN, *Agent*,
By SCHNEIDAU."

Was that letter sent by your office or by you?

A. Yes sir.

Q. Have you sent other letters like that?

A. Yes sir.

ADMISSION.—It is admitted that letters of the same purport and for the same purpose have been sent by the witness to the defendants in this suit when a tow of coal had arrived within the limits of the state of Louisiana since this suit was fied.

Q. Have you not also sent telegrams and other letters of the same tenor?

A. I expect I have, yes, sir; to comply with the law we do that.

Q. Do you know anything about telegrams that were sent even from Natchez, Mississippi, and letters of this like tenor to
114 the state gaugers?

A. No sir.

ADMISSION.—It is admitted that under instructions from counsel the witness has, since the institution of this suit, whenever a tow of coal was about to arrive within the limits, or immediately it had arrived within the limits of the state, given a written notice to the defendants of the arrival of such coal and given the numbers and designation of the coal boats contained in each such tow to be gauged by them, the defendants; that these boats so requested by the complainant to be gauged were part of the fleet of boats in such tows; and it is also admitted that sometimes they did not designate any boats to be gauged, just a notification of the arrival of a tow within the state.

Q. The letter of April 6, 1908, offered in evidence, designates but four coal boats to be gauged by the defendants, were those four boats all the boats that were in the tow?

A. No sir, I have no idea how many other boats there were there.

Q. What does the designation of them in the letter mean?

A. It means those boats were sold, or to be sold according to the Louisiana state gauge measurement.

Q. Now is it not a fact that after April 6, 1908, that you requested the gauge of other boats in that tow?

A. It is possible; I do not know that to be the fact.

Q. I have before me a memorandum which shows that on
115 April 9th you asked that boat No. 9539 of the tow of the John A. Wood of April 4th be gauged?

A. Yes sir.

Q. You merely asked for a certificate of gauge for the purpose of selling that boat by the Louisiana state gauge?

A. Yes sir.

Q. Then on April 10th——

A. I do not know about those dates, but in the run of my business it is possible.

Q. As I understand it those boats that you asked certificates of gauge for were boats that had been sold before they entered into the state?

A. No sir, not always.

Q. Why did you ask for the gauge?

A. Well, for instance, we have a tow coming in which has on the manifest 10 boatloads of coal for Mr. W. G. Milmot; on the way coming down two of those coal boats sink; I do not know they are sunk until the tow arrives; I will find it short and I will have to give two others.

Q. Isn't it a fact that after all these boats come into your possession, or into the possession of the company in the state of Louisiana, that you sell one, two, three or four of them by the Louisiana gauge measurement?

A. When I have the opportunity, yes, sir; when I take a boat I call for the gauge of that boat.

Q. In those cases those boats had not been sold before or at the time they came into the state of Louisiana?

A. Not always.

Q. You only sell those boats some time after they come into your possession according to the Louisiana state gauge?

A. Yes sir.

116 Q. In other words, as I understand it, the company only asks for a certificate of gauge when the boats are sold according to the Louisiana state gauge?

A. Yes sir.

Q. And such, for instance as the boats consigned to Coyle and the United Fruit Company?

A. Yes sir and other coal dealers.

Q. The other boats for which you do not ask certificates, have not been sold either in whole or in part?

A. No sir.

Redirect examination.

By Mr. RICE:

Q. In other words, if I understand, Mr. Whann, you notify the gaugers to gauge such coal as you expect, when the tow has arrived in the state, will be sold in unbroken packages?

A. Yes sir.

Q. And if afterwards an unbroken package is sold then you call upon them to gauge another boat?

A. Yes sir.

Q. And they furnish you with a certificate?

A. Yes sir.

Q. Since this suit was filed you have paid all the state gaugers fees, whether on coal to be sold by broken or by unbroken packages?

A. Yes sir.

Q. That is you have paid all the gaugers fees on broken packages; to whom have you paid them on broken packages?

A. I have paid them under protest to Mr. Capdau.

Q. Who does he represent?

A. He is the bondsman of the gaugers.

117 Q. He represents the defendants?

A. Yes, sir.

Q. Have you ever paid anything to the defendants themselves?

A. I have paid them for all coal I have required a gauge for, that has been sold according to gauge measurement.

Q. That is, up to the present time?

A. Yes, sir, up to date.

Q. Now the gaugers' fees from the time of the filing of this suit up until the time you paid Mr. Capdau the amount designated in the bond, $5000.00, which was paid on the gaugers- fees on broken packages, I say, all that you have paid. There is still a sum on broken packages which is claimed by the defendants of $2100.00?

A. Yes sir.

Q. How have you paid that money to Capdau?

A. I made it payable in a check.

Q. You paid it under protest, did you not?

A. Yes sir.

Q. Capdau was surety on the bond given under order of the Judge of this Court?

A. Yes sir.

Q. You spoke of an inventory of the stock which you took once a month; what stock do you refer to?

A. The stock of coal in my coal yard.

Q. That is, simply your retail business?

A. Yes sir.

Q. Mr. McCaleb asked you a question you could not answer and afterwards said you knew. Do you know why the Pittsburgh people send those statements?

A. Yes sir.

Q. Gauge and weight?

118 A. When we first commenced, at first when the gaugers would bring their gauge certificates into my office we would send a summary furnished by them of the gauges to Pittsburgh and have to wait until that summary was approved before we could pay the gaugers their gauge bills; as the gaugers wanted their money as quick as possible, we always liked to be accommodating and wrote the company and asked them to send me their measurements or weights so I could check the gauge certificates at once and be able to settle with the gaugers so they could get their money.

ADMISSION.—It is admitted that the sum mentioned in the letter of the defendants, introduced in evidence, dated March 24, 1908, is still unpaid.

Mr. MCCALEB: Counsel for defendants offers in evidence letter dated March 24, 1908, marked "D-1" and also letter dated April 6, 1908, marked "D-2."

ELMER E. WOOD, witness, sworn and examined on behalf of complainant, testified as follows:

Direct examination.

By Mr. RICE:

Q. What is your name?

A. Elmer E. Wood.

Q. You are one of the agents of the Monongahela River Consolidated Coal and Coke Company?

A. Yes sir.

119 Q. How long have you been such agent?

A. Since the first of last December.

Q. Where is your office?

A. 315 Carondelet street.

Q. As agent of that company, what is your business?

A. We furnish fuel coal to the Texas and Pacific Railroad and make shipments by rail to various points west of the river.

Q. In other words you sell coal as agent of that company?

A. Yes sir, as agent of the Monongahela River Consolidated Coal and Coke Company.

Q. How much coal have you sold by the coal boat load during that time?

A. You mean unbroken packages?

Q. Yes?

A. I think we sold two barges.

Q. What was the quantity of coal in a barge?

A. It was about 500 tons, I think, one of them was a small barge; possibly less than that.

Q. How does a barge compare in its capacity with a coal boat?

A. Well, usually about half or a little more.

Q. How much coal have you sold in broken packages during that time?

A. I have not the records with me; I would say in the neighborhood of 80,000 or 90,000 tons; that would be probably the equivalent of about 80 boats; a good deal of it was barge coal.

Q. But you have sold only two barges during that time in unbroken packages?

A. Yes sir.

Q. All the balance has been in broken packages?

A. Yes sir; I only recall those two.

120 Q. You mentioned what railroad, the Texas and Pacific?

A. Yes sir.

Q. How do you deliver coal to them?

A. We unload coal from the boats or barges and deliver it by machinery on board of their cars.

Q. Who weighs it?

A. It is weighed by the weighmaster of the Texas and Pacific Railroad Company.

Q. And it is sold by——

A. By the ton and settled for on the Gouldsboro' track scale weight.

Q. Will you tell us whether the gauge of such coal or coal boats by the state gaugers serves any purpose or is of assistance to any person or anybody in the transfer of that coal?

A. Not in the sale of the coal.

Q. In any other way?

A. No sir, it is all the company's coal.

Cross-examination.

By Mr. McCaleb:

Q. What do you understand by the term broken and unbroken package?

A. I understand an unbroken package to mean where the original full load package received from Pittsburgh, or wherever it comes from, is sold in its entirety, and a broken package is where some of the coal has been delivered to one customer and some of it to another.

Q. When you sell by weight do you call that broken or unbroken package?

121 A. I would call that a broken package because the coal is really sold by the ton on board of the railroad companies' cars on their tracks; they don't require the contents of the boats or barges at all.

Q. You were in the business before the Monongahela River Consolidated Coal and Coke Company came into being in 1899, were you not?

A. Yes sir.

Q. Up to the time that you became their agent all the coal shipped to you and sold by you was their coal, was that gauged?

A. No sir, not all of it; all the Pittsburgh coal was sold under gauge until the last couple of years, probably since the institution of this suit, but previous to that we sold quite a large quantity of Alabama coal.

Q. I am speaking of coal that comes by river?

A. This came by river from Greenville.

Q. You required a gauge and paid for the gauge whether the coal was sold in broken or unbroken packages, did you not?

A. We had nothing to do with the gauge, we bought our coal from Pittsburgh, they had it gauged and paid for it and furnished us the certificate for each boat.

Q. All that coal was gauged irrespective of whether it was sold in broken or unbroken packages?

A. I think so.

Q. That is to say, gauged by the Louisiana state inspectors?

A. Yes sir; I refer now to former times.

Redirect examination.

By Mr. Rice:

Q. To what times?

A. Well, I think that gauge certificates were furnished up until the institution of this suit, about a year or two ago, only

122 Pittsburgh coal.

Q. I am referring to the coal from Alabama.

A. The coal we get from Greenville, it was never gauged except where we sold a barge load of it to somebody, then we always called on the gaugers to furnish a certificate, but when we used it in our business and practice we never gauged it.

Recross-examination.

By Mr. McCaleb:

Q. How was that coal brought from Alabama?

A. It was brought out by the Southern Pacific Railway Company to Greenville and towed here from there by barges.

Q. No notice was given to the state gaugers except when the tow or barge would come into the state?

A. No sir, they were all familiar with the fact that we were operating that line for bringing coal here.

Q. Wasn't all that gauged by the Louisiana state gaugers, that Alabama coal?

A. No sir.

Q. Wasn't a notice sent to the state gaugers?

A. The matter was discussed, I think, with the predecessors of the present gaugers and they decided that they would not enforce the gauging of that coal.

Q. You are not referring to the present state gaugers?

A. No sir, I would not be positive about that, I think it was before that, I think we stopped our operations in 1903 or 1904. It was before the present inspectors came into office.

123 R. W. Wilmot, witness, sworn and examined on behalf of complainant, testified as follows:

Direct examination.

By Mr. Rice:

Q. What is your name?

A. R. W. Wilmot.

Q. You are the manager of the Monongahela River Consolidated Coal and Coke Company's affairs in Louisiana?

A. Yes sir.

Q. And have been manager, or its principal agent, for how long?

A. Since the 1st of October, 1899, when the company was formed.

Q. The coal that comes from Pittsburgh for the Louisiana trade comes in that shape?

A. It comes in tows of boats and barges, chiefly boats.

Q. How many in a tow?

A. It depends upon the size and power of the tow-boat; it may be 20, 25, 30, or as many as 45 or 50.

Q. To whom is that consigned?

A. To W. G. Wilmot and Company, Agents.

Q. It is sold in Louisiana at what points?

A. At the coal landings; at Coalport, at Nine-Mile Point, just above the city, and at Willow Grove, and at other points along the river just above Donaldsonville and Baton Rouge and Bayou Sara.

Q. Those are the five places?

A. Yes sir.

Q. It is held at those places for sale and delivery?

A. Held there until it is required for delivery.

Q. What other agents are there of the Monongahela River Consoli-

dated Coal and Coke Company for the sale of coal in Lou-
124 isiana?

A. Well, there are no other direct agents in the employ of the company except those who testified this afternoon, but there are agents of the company who do a plantation business and sell coal for our company on a commission basis.

Q. Who are those?

A. J. C. Jung and Company, W. G. Coyle, The Ascension Coal Company, Baton Rouge Coal and Ice Company, Irwin Coal Company, Bayou Sara, and the Nunn-Heffron Coal Company, New Orleans.

Q. Those doing business in New Orleans?

A. J. C. Jung and Company, W. G. Coyle, and the Nunn-Heffron Coal Company.

Q. The others do business elsewhere in the state?

A. Yes sir.

Q. They sell coal on commission?

A. Yes sir.

Q. You are familiar, I suppose, with the way in which the business of the Monongahela River Consolidated Coal and Coke Company is carried on in Louisiana?

A. Yes sir.

Q. Can you approximate the proportion of the coal of that company which is sold in Louisiana by the unbroken package, and the quantity which is sold in broken packages?

A. I should say that the coal taken by the company for its own use and which would have to be classed as broken packages, would be five times as much fully as that sold in the original package on which delivery would be made according to the state gaugers' certificates.

Q. Has there been any difference of late years in the amount of coal, especially in the planters' trade, sold in unbroken packages?

125 A. Yes sir, I should say a very great difference within the last five years.

Q. To what is that due?

A. To the discovery and delivery of fuel oil, this Texas and Louisiana oil has cut down the plantation fuel business so far as our company is concerned almost to nothing; the sales to planters fifteen or twenty years ago would run, I suppose, easily to 500, 600 or 700 boats of coal a year, and now I don't suppose it would run to 50.

Q. Can you name any parties in Louisiana to whom the coal of the complainant is sold in unbroken packages?

A. Yes sir, our company has been supplying through the Schneidau Agency the United Fruit Company, who take coal by—that is, they have taken coal by the state gauge measurement, and our company unloads the coal for it and puts the coal on the ship and they settle by the state gauge measurement; then there is the firm of Coyle and Company; they are large buyers of coal and settle for it on the state gauge certificates.

Q. How much coal did they take on an average a year?

A. I should say in round numbers from 125 to 150 boats a year, perhaps more; they take whatever they require.

Q. How long has that been going on?

A. For a number of years; I should say that has been going on ever since our company was formed in 1899.

Q. Any other persons?

A. Yes, J. C. Jung and Company have been getting coal from our company right along.

Q. For how long?

A. During the past year.

Q. How much did they take during the past year?

126 A. I have not counted it off, I suppose six or eight boats perhaps.

Q. Any other persons whom you can name to whom coal has been delivered in unbroken packages through dealers or others than those you have mentioned?

A. Coal has been sold here to people like the waterworks company; then there is a man named Irwin who runs a small business here; he takes one or two or three boats a year. Then there is the Nunn-Heffron Company, which has not been in business very long, but it has bought a boat from our company already; before that company was formed the predecessor, F. B. Nunn, took all his coal in that way. Of course his business fell off in latter years, but 12 or 15 boats a year he took according to conditions.

Q. Do you think of any other persons who took coal by the unbroken package?

A. There was an occasional buyer, for instance the Government buys coal here from time to time, and then occasionally there would be some coal bought, for instance, by the State Board of Health down here for its Quarantine Station; then the bar pilots' association down at the Jetties would buy a boat about once a year.

Q. That is about the limit?

A. I think that is a fair statement in a general way.

Q. All this coal you have mentioned is sold by the state gauge measure?

A. Yes sir.

Q. And that amounts to what proportion of the coal arriving from the complainant in this state per year?

A. I should think, in a rough way, about one-fifth.

Q. Now for the balance, or four-fifths, how is that disposed of?

127 A. The rest of that coal is shipped from Pittsburgh by our company and remains our company's property, and when the company has its contracts to fill it goes and takes the coal out of these boats as it requires; if it wants 100 or 200 tons it takes it out. In this peddling out of the coal in small lots we have no use for the gauge certificates; we don't require them because the coal is taken without reference to these certificates.

Q. This coal in unbroken packages is sold to what class of customers?

A. It is sold to the steamship trade, the railroad companies, to manufacturers in the interior, and to anybody who wants coal.

Q. Is the steamship trade large or small?

A. In New Orleans, here, I should say it amounts to between 400,000 and 500,000 tons a year; I think the Government statistics during the year 1907 show about 430 odd thousand tons of steamship coal.

Q. Does the coal company consume any of its own coal?

A. Yes sir, we have our machinery, tugs and pump-boats at these coal fleets where we keep our boats and barges of coal; we have pump-boats there which are operated by steam and that require fuel to run them; then we have a number of tug-boats which have to be run; they take coal for fuel; then we have the machinery on the elevators, our floating elevators and the stationary elevators at the railroad stations, and we have dredges.

Q. So the company uses its own coal to make steam?

A. Yes sir.

Q. To what extent?

A. I should say for the tugs and pump-boats and floating
128 elevators and such work as that in the harbor here, we use about anywhere from 15 to 20 boats a year.

Q. What object or purpose does the gauge of that coal by the state gaugers serve?

A. None whatever. We go and get coal for these boats and machines and make no reference to the state gaugers' certificates; we settle according to weight or measure.

Cross-examination.

By Mr. McCaleb:

Q. Don't you sell coal by the barrel?

A. My particular branch is not connected with the city trade, I am on the marine end of it. I sell coal to steamboats, or what is called the packets; we take the coal out of these original packages and load it on to small lighters and put it up in bins. The steamboat box has been worked out as 180 pounds, or equivalent to 3½ cubic feet of coal. We bring our flats alongside of the steamboat and if they want 100 boxes of coal we empty a bin containing 350 cubic feet.

Q. What is equivalent to that in bushels?

A. That would have to be worked out; I could not say off hand. It depends upon what you figure it at. If you figure it at 80 pounds to the bushel that would be 2¼ bushels.

Q. What would be the equivalent in bushel measurement, roughly speaking?

A. 2½ times the number of barrels, I should say. You want to know how many barrels for instance would be the equivalent of 100 boxes of coal?

Q. Yes?

A. Multiply roughly by 2½, or 250 barrels would be the
129 equivalent of 100 boxes of coal.

Q. Which you also term barrel or 180 pounds?

A. No sir, we do not speak of it as barrel, we style it as a box.

Q. That only refers to steamboat trade?

A. Yes sir; now the rest of our coal is sold by the ton.

Q. I am speaking of coal that is sold by the ton; don't you sell coal to the city trade by the barrel?

A. Our company does.

Q. I say your company, not you?

A. Yes sir, our company sells coal in the city by the old barrel custom, 180 pounds to the barrel.

Q. That is for lump coal and 200 pounds for slack coal?

A. 180 pounds when I was in the retail business.

Q. In other words ten barrels of coal would be the equivalent of 1800 pounds?

A. Yes sir.

Q. Does all this Pittsburgh coal run about the same specific gravity?

A. No sir, it varies considerably; the specific gravity from one mine is usually entirely different from that of another mine; of course, some of them run pretty close together.

Q. Therefore, some coal that is put into a barrel would weigh more than 180 pounds; another coal in the same barrel would weigh less, according to the specific gravity of the coal?

A. Yes sir.

Q. You state that a good deal of your trade has fallen off; do you mean your planters' trade?

A. The plantation trade, and then there is other trade in the state that has fallen off on account of oil and on account of the competition of Alabama coal. For instance, the New Orleans Rail-
130 ways Company was a customer of our company in the olden times; that has gone over to Alabama coal; the American Sugar Refinery used to be one of our largest customers in the country—was formerly our customer—but they have gone over to Alabama coal.

Q. Hasn't there been some increase in other lines to offset that falling off?

A. No, I cannot say that there has been; the steamship trade remains pretty steady, and the railway trade, that has had its little spurts, but I should not say that there is any great increase in that.

Q. Have you noticed any particular increase in the railroad business?

A. It went up a little last year and fell off this.

Q. But your company does sell coal to planters?

A. Yes sir.

Q. Don't you sell coal to planters after the high river recedes?

A. We sell it at any time they want it and give it to them any time, usually this season, about this time it begins going up, but this year the river is high and the planters are not in a hurry.

Q. Don't you expect to catch all your planters' trade back?

A. No sir; I was hopeful this year, but they have got oil down here and it looks worse than ever, the oil people claim that all this Texas and Louisiana oil will come on this market as fuel, as the oil to be refined will be gotten from Oklahoma here; we were very much

elated in the beginning of the year, but our recent information is very gloomy.

131 JUNE 2, 1908.

R. W. WILMOT recalled.

Direct examination.

By Mr. RICE:

Q. Mr. McCaleb, on behalf of the respondents, requested Mr. Whann yesterday to produce certain papers. I hand you four pieces or sheets of paper and ask you if those are in response to that call or request?

A. Yes sir, these are in response to that call of Mr. McCaleb.

Mr. RICE: These papers I will mark Whann 1, Whann 2, Whann 3, Whann 4 and Whann 5.

Q. Now explain them?

A. The slip marked Whann 1 is a memorandum from the Pittsburgh office of our company giving the pit measure, that is the weight of the coal as taken by the company's weighmaster and the weighmaster representing the miners at the coal tipple where the boat referred to in this slip was loaded with coal; that is, in the Monongahela River in the Pittsburgh district. The next slip marked Whann 2 is a gauge certificate sent us from the Pittsburgh office and is a specimen of the cubic measurement certificate taken at Pittsburgh for boats of coal. The next paper marked Whann 3 is a form of manifest for coal tows which we now use. This form has a column in which are set down the number of bushels of coal in each boat in the tow for which the manifest is issued. This column was inserted as a matter of convenience in keeping our records here in New Orleans and not for any other special purpose. The next paper marked Whann 4 is a form of manifest that was
132 formerly used before the Pittsburgh office adopted the plan of inserting a column which would state the contents of each boat. Whann 5, I think is merely a continuation of Whann 4; I think it is the second page of Whann 4.

Mr. RICE: The documents identified by the witness are now tendered to solicitor for respondents.

Cross-examination.

By Mr. MCCALEB:

Q. These are specimens taken from all the manifests and certificates of the complainant company, are they not?

A. Yes sir, they are fair specimens of such papers as they represent.

Q. The other papers would practically show what these papers do?

A. Yes sir, give the same information, of course they would refer to different tows and different boats of tows, but these are fair specimens of the forms we have for keeping information of this nature.

Q. And this certificate marked Whann 1, you have stated that that shows the pit measurement?

A. Yes sir, the pit weights, rather.

Q. This shows the amount in bushels?

A. Yes sir.

Q. Wouldn't that also show the pit measurement if you have it in bushels?

A. The pit measurement set forth on this certificate is the weight of the coal taken by two weighmen at the mines.

Q. Doesn't it also show the amount of bushels?

A. Yes sir, here are the bushels set down, about 10,445 to
133 25,618 bushels.

Q. That is the measure of that coal in the boat?

A. It is the weight of the coal as it passes from the coal cars into the boat.

Q. Isn't it also the measurement?

A. No sir, there might not be the same in this mine as there would be in another mine; this is the weight.

Q. It does not say weight, it says so many bushels.

A. I know, but that is the bushels by weight, not bushels by any cubic measurement, weight of coal, so many pounds to the bushel.

Q. How do you know that?

A. Because I have been at the mines lots of times, I know what pit measurement is, I know the measurement is the weight of the coal as it comes out. This other gives you the cubic measurement of the boat.

Q. What is the purpose of this certificate marked Whann 1?

A. The purpose of this is, it gives the information that we require at this end to keep the records of that particular boat; the company sends this boat of coal and we take it and deliver the coal. We have got to know how much coal this boat contains so we can keep a run of it and we are getting something like the equivalent at this end that was put into it at Pittsburgh.

Q. You say also that the pit measurement is made by a man that represents the miners association and also a man that represents the company?

A. That is what I understand.

Q. What is the purpose of that?

A. The purpose of this is, in olden times the miners claimed that they did not get fair treatment from the mine owners, and
134 as they were able to organize very strongly they were in a position afterwards to impose their own will and conditions on the mine owners, and one of these conditions was that the miners should have representation when the weights were taken to see that they were being fairly treated. This system has been in vogue for many years.

Q. Therefore that pit measurement is a check for both the miners and the company?

A. Yes sir and it represents the basis of settlement as between the mine owner and the miner.

Q. And they send you that certificate?

A. They have at times; now sometimes when they don't send a

measure certificate they will send these other certificates, certificates taken by other measurement at Pittsburgh, marked Whann 2.

Q. This certificate marked Whann 2 represents the measurement or gauge of the coal made by the company when the coal is on the boat?

A. Yes sir, the company has a clerk for measuring coal, and I think he is a clerk in the company's sole employ and he goes about and measures these boats cubically.

Q. And this certificate is also sent to the agent of this company in Louisiana?

A. Yes sir. The purpose of that certificate would be, among other things, for the proper apportionment of expenses in connection with the movement of this coal; for instance each tow-boat has to be credited with her earnings and it is to have some basis on which to see how much coal she tows so she may be credited so much per bushel for the tow.

Q. Isn't it also a check for the agent here?

A. Yes sir. In our business, of course, it is not used in
135 selling coal in unbroken packages; it is only used as a check for our deliveries here, broken lot deliveries.

Q. Is it also not used as a check on the Louisiana state gaugers?

A. I cannot say that it is; I think possibly that Mr. Whann uses it in that way; he gets his gauge certificates and he probably compares them.

Q. And if the gauge certificate of the company does not agree with the certificate of the inspectors, a regauge may be necessary, may it not?

A. I am under the impression that Mr. Whann, who attends to that part of the business, will call their attention to any disagreement between their certificates and ask for a regauge if he thinks it is necessary.

Q. The manifests also show the number of bushels or measurement of the boats as shown by Whann 3?

A. Yes sir.

Q. Do you know when these manifests in this form like Whann 3 were issued by the company?

A. No, I could not give you the exact date; it is some time back.

Q. This one says April 4?

A. It was prior to April 4, 1907. We can probably get you that information by looking at the manifests and see what was the first one we got.

Q. This suit was filed in October, 1906, can it have been before then?

A. I cannot say; I can get the information if you wish.

Q. The document marked Whann 4, there does not appear to be any gauge at all of the boats?

A. There is no column giving the contents.

Q. That shows on November 17, 1905; do you know whether that was the last time the company issued a manifest of this char-
136 acter?

A. I do not. These were taken, as I understand it, at random and handed to me at the office this morning.

Q. Whann 5 is the same as Whann 4?
A. Yes sir, it is a continuation of Whann 4.
Q. The certificate marked Whann 2 is therefore a measurement showing the gauge of the coal when it leaves——
A. As taken at Pittsburgh.
Q. Or the Pittsburgh district?
A. Yes sir.

Mr. RICE: I offer these documents in evidence, marked Whann 1, Whann 2, Whann 3, Whann 4, and Whann 5.

137 JUNE 8, 1908.

FRANK WALSHE, witness sworn and examined on behalf of complainant, testified as follows:

Direct examination.

By Mr. RICE:

Q. What is your name?
A. Frank Walshe.
Q. You reside in this city?
A. Yes sir.
Q. And are a coal merchant?
A. Yes sir.
Q. Agent for what company?
A. Tennessee Coal, Iron and R. R. Co.
Q. And have been for how long?
A. About 11 years. I have been in the Alabama coal business for nearly 17 years.
Q. Your business is——
A. Handling Alabama coal exclusively.
Q. How many other agents are there in this city selling Alabama coal?
A. Robert P. Hyams Coal Co., Darsan Bros., The Tutwiler Coal and Coke Co. The C. A. Andrews Coal Co. The Dufour Coal and Coke Co. They are the principal ones.
Q. How is the coal brought from Alabama to New Orleans for that trade?
A. By railroad.
Q. Entirely?
A. Entirely at this time.
Q. You say at this time, how has it been brought?
A. Some five years ago some Alabama coal was brought here by river from Greenville, Miss.
Q. None now?
A. No sir.

138 Q. Can you state what quantity of coal has come on an average annually to New Orleans from Alabama during the past 5 years?
A. It has averaged over a million tons.
Q. Is that trade on the increase or decrease?
A. Increase.

Q. Have you any objections to stating what the aggregate quantity was brought to this port or to Louisiana last year?

A. I don't know exactly what the tonnage was. It ran between half a million and 600,000 tons.

Q. Do the State Coal Gaugers render any service in connection with that coal?

Mr. McCaleb: I object to that on the ground that it is irrelevant.

A. They do not.

Cross-examination.

By Mr. McCaleb:

Q. How does this coal come into Louisiana from Alabama. You stated by rail?

A. Yes sir.

Q. In cars?

A. In open cars.

Q. About how many barrels or bushels of coal are there in each car?

A. Well, it varies, cars are of different capacities and sizes, they run from 40,000 pound capacity car to 100,000.

Q. Those are the regulation cars, say from 40,000 to 100,000 pounds?

A. Yes sir, 40,000 being the minimum.

Q. About how many barrels of coal does each car contain?

A. The average car is a 80,000 pound capacity car, that carries about 445 barrels, about 40 tons.

Q. When these cars come in, you can see how much coal is in the car by mere inspection can you not?

139 A. We can't tell how much is in it. We can tell whether the car is fully loaded or not. If it shows signs of having been robbed en route we have it re-weighed in New Orleans.

Q. Do you know about how many bushels of coal are in cars?

A. We don't use the term bushel at all in handling coal in this market, in handing Alabama coal. A bushel of coal weighs about 80 pounds, there are about 25 bushels to the ton. In 40 tons there would be about 1000 bushels. On that basis. But we don't use the term bushel. We don't know it in our business.

Q. You just use the ton weight?

A. Yes sir, we buy it by the ton and we sell it principally by the ton.

Q. Did you ever buy Pittsburg coal for sale?

A. Yes sir.

Q. How long ago?

A. That has been about ten years ago, as near as I can recollect.

Q. How did you buy that coal?

A. You mean on the basis of measurement?

Q. Yes?

A. I bought it on the basis of the State Gaugers certificate.

Q. When you bought that coal you bought it under that certificate issued by the State Inspectors?

A. Yes sir, their certificate was attached to the invoice of the coal.

Q. Was that the way that coal was generally sold in Louisiana at that time when you were buying Pittsburg coal?

A. I have no personal knowledge of that because I did not handle Pittsburg coal. This was simply to take care of some contract where we couldn't get our own stuff through.

By Mr. RICE:

Q. That coal I suppose you bought by the boat load?

A. I bought it in the original package.

140 Q. And it had been inspected by the State Gaugers and you took their certificate of the contents?

A. Yes sir.

Q. If you had wanted to buy a broken package or a portion of a boat load, or you had wanted to peddle out a boat load in parts, would the State Gaugers certificate be of any assistance to you?

Mr. MCCALEB: I object to that question. That it is hypothetical and conjectural and calls for the opinion of the witness.

A. I would have no use for a gaugers' certificate under those circumstances. I would buy on scale weights.

141 DOCUMENT MARKED EXHIBIT "B."

Offered by Complainant in Connection with the Testimony of Robt. J. Whann. Filed *nunc pro tunc* as of Date June 9, 1908.

All agreements contingent upon strikes or other causes beyond our control.

Telegraphic address, "Rivercoal New Orleans."

The Monongahela River Consolidated Coal and Coke Company.

Pittsburgh Coal.

Marine Department, 325 Carondelet Street.

NEW ORLEANS, LA.

Coal Received from Oct. 1st, 1899, to May 31st, 1908.

Oct. 1st	1899 to Sept. 30th,	1900	928	Packages.
" "	1900 " " "	1901	1389	"
" "	1901 " " "	1902	882	"
" "	1902 " " "	1903	824	"
" "	1903 " " "	1904	1022	"
" "	1904 " " "	1905	721	"
" "	1905 " " "	1906	664	"
" "	1906 " " "	1907	834	"
" "	1907 " May 31st,	1908	688	"
Total			7952	Packages.

During year beginning Oct. 1st, 1899, and ending Sept. 30th, 1900, R. J. Whann's sales were 188 boats; 15 of these required gauging.

During the same months in the years 1905 and 1906, 233 boats were sold, 13 of which required gauging.

142 *Bill and Answer*

Offered by Complainant and Referred to in Complainant's Note of Evidence.

NOTE.—Copied at pages 1, *et seq.*, and 29, *et seq.*, respectively, of this transcript.

143 *Copy of Act No. 147 of General Assembly of Louisiana of 1888, of No. 137 of 1894, of No. 58 of 1902, and of No. 80 of 1904.*

Offered by Complainant and Referred to in Complainant's Note of Evidence.

No. 147.

AN ACT

Entitled An act for the appointment of two coal and coke boat gaugers, to fix their compensation, and to define their duties.

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That there shall be appointed by the governor, by and with the advice & consent of the Senate, two coal and coke boat gaugers, who shall have their offices in the City of New Orleans: provided, however, that the Governor shall have the power to remove from office any coal and coke boat or barge gauger upon satisfactory proof made to him of negligence or official misconduct.

SECTION 2. Each of said gaugers shall give bond, payable to the Governor or his successor in office, with two sufficient sureties, in the penal sum of five thousand dollars, conditioned for the faithful performance of the duties required of him by law.

SECTION 3. It shall be the duty of said gaugers when called upon for that purpose, to gauge any coal or coke boat or barge in the port of New Orleans or the State of Louisiana.

SECTION 4. Such gauging shall consist in reducing the length, breadth and depth, inside measurement, of boats, or barges, deducting all obstructions and displacements, into cubic inches and dividing said cubic inches by twenty-six hundred and eighty-eight (2688), thus ascertaining the net measurement in bushels. Two and six-tenths (2 6/10) bushels shall constitute a barrel.

SECTION 5. In all cases it shall be the duty of the gaugers, or either of them, to respond promptly to any call made for their or either of their services, and to furnish a full and detailed certificate of gross measurement of the boat or barge gauged, and the allowance made for obstructions and displacements.

SECTION 6. The fee for gauging or re*gua*ging shall be ten dollars ($10) for each boat, and five dollars for each barge, to be paid by the seller, except as is hereinafter provided.

SECTION 7. The purchaser of any boat or barge of coal or coke, shall have the privilege of calling upon the said gauger or gaugers or rega-ge boats or barges in all cases where the original gauge is not satisfactory, and such regauge shall be adopted as the correct measure. If the original gauge shall be found to be correct, then the purchaser shall pay the fee for regauging; but if the regauge shows a less measure, then the seller shall pay the fee.

SECTION 8. No boat load of coal or coke shall be sold in this city or State until it has been inspected as provided for in this act. And any person who shall sell a boat load of coal or coke that has not been gauged as aforesaid, shall be liable to a penalty of fifty dollars ($50) for each boat or barge so sold, to be recovered, with
144 costs of suit, in any court of competent jurisdiction, for the benefit of the Charity Hospital of New Orleans.

SECTION 9. The term of office of said gaugers shall be four years. This act to take effect from and after its passage.

(Signed) S. P. HENRY,
Speaker of the House of Representatives.

(Signed) JAMES JEFFRIES,
Lieutenant-Governor and President of the Senate.

Approved July 12, 1888.

(Signed) FRANCIS T. NICHOLLS,
Governor of the State of Louisiana.

A true copy from the original.

(Signed) JOS. GEBELIN,
Assistant Secretary of State.

145 No. 137.

AN ACT

To compel the weighing or gauging in the State, of all bituminous or anthracite coal or coke sold in Louisiana by boat, barge or car load.

Be it enacted by the General Assembly of the State of Louisiana:

SECTION 1. That all anthracite or bituminous coal sold in this State, under the direction of the Governor by the State Gaugers, whose fees, duties and responsibilities shall remain as now fixed by law, provided the fee for weighing shall not exceed one cent per ton.

SECTION 2. Be it further enacted, etc., That the standard measures for the bituminous and anthracite coal in this State shall be the barrel containing 6,988 cubic inches and the standard ton of 2000 pounds.

SECTION 3. Be it further enacted, etc., That whoever shall violate the provisions of this act shall be adjudged guilty of a misdemeanor

and shall be fined not less than $50, nor more than $100 at the discretion of the court, for each offense.

(Signed) G. W. BOLTON,
Speaker of the House of Representatives.

(Signed) H. R. LOTT,
President pro Tempore of the Senate.

Approved July 12, 1894.

(Signed) MURPHY J. FOSTER,
Governor of the State of Louisiana.

A true copy:

(Signed) GEO. SPENCER,
Assistant Secretary of State.

146 Senate Bill No. 47.

Act No. 58.

AN ACT

To amend Act 137 of the session of 1894, entitled An act to compel the weighing or gauging in the State of all bituminous or anthracite coal or coke sold in Louisiana by boat, barge or carload.

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That Section 1 of Act 137 of the session of 1894 be amended and re-enacted so as to read as follows:

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That all anthracite or bituminous coal sold in this State shall be gauged or weighed by the State Coal and Coke Gaugers in the State, whose fees, duties and responsibilities shall remain as now fixed by law, provided the fee for weighing shall not exceed one cent per ton.

(Signed) J. Y. SANDERS,
Speaker of the House of Representatives.

(Signed) ALBERT ESTOPINAL,
Lieutenant Governor and President of the Senate.

Approved: June 26th, A. D 1902.

(Signed) W. W. HEARD,
Governor of the State of Louisiana.

A true copy:

(Signed) JOHN T. MICHEL,
Secretary of State.

147

Act No. 80.

By Mr. Dymond.

Senate Bill No. 97.

AN ACT.

Entitled an act to amend and re-enact sections 3, 5 and 8 of an act entitled "An act for the appointment of two coal and coke boat gaugers, to fix their compensation, and to define their duties;" being Act No. 147, approved July 12th, 1888.

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That Section 3 of Act No. 147 of the General Assembly of the State of Louisiana, approved July 12th, 1888, be amended and re-enacted so as to read as follows, to-wit: "Section 3; It shall be the duty of said gaugers to gauge all boats and barges containing coal whether anthracite or bituminous, or coke, brought into the State of Louisiana for sale or for delivery under sales made out of this State."

SECTION 2. Be it further enacted by the General Assembly of the State of Louisiana, That Section 5 of Act No. 147 of the General Assembly of the State of Louisiana approved July 12th, 1888, be amended and re-enacted so as to read as follows: "Section 5: In all cases it shall be the duty of the gaugers, or either of them, to respond promptly to any call made for their, or either of their services, and to furnish a full and detailed certificate of gross measurement of the boat or barge gauged, and the allowance made for obstructions and displacements, provided, however, that the failure to call upon them, or either of them, shall not relieve them, or either of them, of the obligation to gauge all coal and coke boats and barges as provided by Section 1 of this act.

SECTION 3. Be it further enacted by the General Assembly of the State of Louisiana, That Section 8 of Act No. 147 of the General Assembly of the State of Louisiana, approved July 12th, 1888, be amended and re-enacted as to read as follows: "Section 8" No boat load of coal or coke, nor any part thereof, shall be delivered to the purchaser, whether the sale thereof was made within or without the State, until it has been inspected *as provided for in this act.* A any person, partnership, firm or corporation who shall sell or deli in this State a boat load or a barge load of coal or coke, or any part thereof, that has *not been gauged as herein provided*, or who, within twenty-four (24) hours after the arrival in this State of any boat or barge loaded with coal or coke, shall not have notified said coal gaugers, or either of them, at their offices in the City of New Orleans, of its arrival in this State, *requesting that the same be* gauged as aforesaid, shall be liable to a penalty of fifty dollars ($50) for each boat or barge of coal or coke, or part thereof, so sold, or delivered, and for each boat or barge so arriving in this State of which no notice was given to the said coal gaugers, to be recovered with costs of suit,

in any court of competent jurisdiction for the benefit of the Charity Hospital of the City of New Orleans.

SECTION 4. Be it further enacted by the General Assembly of the State of Louisiana, That this act shall take effect from and after its passage, and that all laws and parts of laws in conflict or inconsistent therewith be and the same are hereby repealed.

(Signed) R. H. SNYDER,
Speaker of the House of Representatives.

143 Act No. 80.
(Signed) P. M. LAMBREMONT,
President pro Tempore of the Senate.

Approved July 1, A. D. 1904.
(Signed) NEWTON C. BLANCHARD,
Governor of the State of Louisiana.

A true copy.
(Signed) JOHN T. MICHEL,
Secretary of State.

[Endorsed:] 13437. U. S. Circuit Court, Eastern District of La. Act of General Assembly of Louisiana, Copy of No. 147 of 1888, No. 137 of 1894, No. 58 of 1902, No. 80 of 1904.

149 Filed June 13th, 1908, *nunc pro tunc.*

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana, New Orleans Division.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
versus
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal and Coke.

Note of Evidence on Behalf of Defendants.

In accordance with the rules of practice of the Circuit Court of the United States, Fifth Circuit, Eastern District of Louisiana, particularly rules relative to the final hearing of equity cases, adopted May 2nd, 1880, to be found on page 16 of the rules of this Honorable Court, Counsel for defendants, file the following evidence and ask that the same be noted by the Clerk and that this Note of Evidence be entered on the minutes of the Court.

1st. Deposition and testimony of George H. Duclaux taken before H. J. Carter, United States Commissioner, on June 2nd, 1908.

2nd. Statements, documents and exhibits annexed to said deposition.

3rd. Deposition and testimony of Joseph L. Rock, taken before Henry J. Carter, United States Commissioner at New Orleans, on June 2nd, 1908.

4th. Statements, documents and exhibits annexed to said deposition.

5th. Admission entered between Counsel relative to the testimony of Louis Knop, one of the respondents.

6th. Specimen of gauging taken from memorandums of gauging referred to in the testimony of Joseph L. Rock, from page 13 of the tow Joseph B. Williams and page 13 of the tow John A. Wood, and the admission of Counsel with the memorandums of the
150 gauging will be approximately the same as in these two instances.

7th. Document and exhibit marked D1, D2, D3, D4, and D5.

8th. Document marked Whann 1, Whann 2, Whann 3, Whann 4 and Whann 5.

(Signed) WALTER GUION,
Att'y Gen'l of La., Solicitor for Defendants.
E. H. McCALEB, Jr.,
Of Counsel.

151 DEFENDANTS' EVIDENCE.

Depositions of George H. Duclaux and Joseph L. Rock.

Offered by Defendants and Filed June 9, 1908, *nunc pro tunc.*

United States Circuit Court, Eastern District of Louisiana.

No. —.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE CO.
vs.
JOSEPH L. ROCK and LOUIS KNOP, Individually and as State Coal Gaugers.

Testimony Taken in the Above Numbered and Entitled Cause on Behalf of Defendants, on the 2nd Day of June, Before Henry J. Carter, Esq., U. S. Commissioner, at New Orleans, La.

Appearances.

Mr. E. H. McCaleb, Jr., representing defendants.
Mr. Charles S. Rice, representing complainant.

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152 GEORGE H. DUCLAUX, witness sworn and examined on behalf of respondent, testified as follows:

Direct examination.

By Mr. McCALEB:

Q. What is your name?

A. George H. Duclaux.

Q. You are a member of the New Orleans bar?

A. Yes sir.

Q. Prior to becoming a member of the New Orleans Bar in what business were you engaged?

A. I was with the Monongahela River Consolidated Coal and Coke Co. in Mr. Whann's office.

Q. And prior to the formation of that company?

A. I was connected with Mr. Whann for many years prior to the formation of the company.

Q. How long were you engaged in the coal business in the city of New Orleans?

A. I suppose about 25 years.

Q. Would your experience in that business enable you to know all about the coal business as operated in the State of Louisiana and in the city of New Orleans?

A. I believe it would. A certain portion of it of course some lines of the business I had nothing to do with, the steamship business, anything like that I have just a vague idea of it.

Q. Prior to the formation of the Monongahela River Consolidated Coal and Coke Co. in October 1899, will you state approximately how many concerns were in the coal business in the City of New Orleans?

OBJECTION.—Mr. RICE: Objected to on the ground that it is both irrelevant and has no foundation laid for it in the pleadings, and motion will be made to strike out all evidence on the subject
153 required about.

A. 10 or 12.

Q. Do you know about how many are now engaged in this business in New Orleans, since the formation of this company? Those that are not connected with the Monongahela River Consolidated Coal and — Co., approximately?

A. Well, Coyle and Co. Jung and Sons Coal Co., that is about all I know.

Q. Have you had occasion, in the course of your business, or, at least while you were in the coal business to investigate the gauging of coal as it came into the State of Louisiana?

A. To some extent, yes sir.

Q. I show you a specimen of a certificate testified to by Mr. Wilmot, marked Whann 1 and ask you that in the course of your employment and business with Mr. Whann, if certificates of that character were issued by the company and delivered to Mr. Whann or the agents of the Monongahela River Consolidated Coal and — Co.?

A. It was a very rare exception when certificates of this character

were ever issued to Mr. Whann's office. The only time at all was when a certificate of that kind was issued, to my knowledge, was where there was a discrepancy in a gauge and we could not locate the discrepancy and then this certificate was issued to us to show us the fact that amount of coal had been loaded by the miners at the pit, and settled for by the Monongahela River Consolidated Coal and Coke Co. But, as a general rule these certificates were rarely ever issued to us. I refer to this one showing pit measurement, marked Whann 1.

Q. That certificate shows the number of bushels?

A. 25,618 bushels.

154 Q. Can it be determined from that certificate how many barrels of coal went into the boats at the time the measurement was made?

A. Taking the bushels and dividing them by 2.6 bushels to a barrel, you can easily ascertain the barrels, that is, according to the Louisiana State Gauge Laws.

Q. Look at the certificate marked Whann 2 and tell us what that certificate is?

A. That is a gauge of the boat.

Q. Made where?

A. Pittsburg, Penn., April 30th, 1908.

Q. Do you know by whom?

A. Signed Fred W. Theiss.

Q. Look at the next document marked Whann 3 and tell us what that is?

A. That is a manifest of a tow boat?

Q. Does that show the gauge of the several boats in the tow?

A. It shows the contents of the boats with certain exceptions where it is marked pit, which I would judge means there was no gauge taken, that the pit measurement was used on these exceptions.

Q. Look at the document marked Whann 4 and Whann 5 and state if that document shows any measurement of the boat?

A. No, neither one of those show any measurements or any contents, that is, except the description of the contents, but not the quantity.

Q. Can you tell us what is generally the weight of a barrel of coal?

A. Well, the weight of a barrel of coal——

Q. Lump coal?

A. Lump coal in New Orleans is 180 pounds.

Q. What does that indicate?

A. I don't quite understand the drift of your question?

Q. Does that show any relation between the weight and the measurement?

A. Well, it would show it in this way, that the weight as

155 delivered would be a talley on the measurement in your settlement of your accounts with your office. In other words if you should put a boat load of coal in your yard that was supposed to contain 1000 barrels and you delivered 180 pounds to the barrel, it ought to talley, or if there was a discrepancy it could be explained.

Q. Would that same explanation apply in cases of sales by the barrel or sales by the ton?

A. Yes sir.

Q. Do you know what is understood by regauging?

A. I believe I do.

Q. What is meant by regauging?

A. Well, regauging, as I understand, can be taken in two ways, Where a portion of a boat is sold to one man and the balance of the boat to another, why, a regauging is then asked for, and a regauging is asked for when there is a discrepancy between the original gauge and the gauge as shown by the Pittsburg measurement, then a regauging is asked for.

Q. Is that regauging asked for by the purchasers of the boats?

A. That is generally asked for by the agent of the Monongahela River Consolidated Coal and Coke Co. Sometimes a purchaser of a boat will ask for a regauging but that is exceptional.

Q. Do you know of any concern who purchases coal of the Monongahela River Consolidated Coal and Coke Co., who requires certificates of gauging?

A. I have not been with the Monongahela River Consolidated Coal and Coke Co. for some years, I couldn't tell you of any concern right now. I am not familiar with the business as to who purchases coal at the present time, but during the time I was with them there was the Water Works Co. the Ferry Company, I believe Mr. Whann has testified to the whole list of those.

Q. Will you please state what benefits are derived from the
156 gauging of these boats as they come into the State of Louisiana, either to the Monongahela River Consolidated Coal and Coke Co. or to the purchasers of coal? and the necessity for such gauging?

A. The gauge was presumed to be a protection to the purchaser in showing him he got just what he purchased?

Mr. RICE: Answer objected to as not responsive to the question, but is simply a presumption as expressed on its face on the part of the witness.

A. And it was also a means to have a check upon the stock, it facilitated you in finding out just how your stock stood, whether it ran short or whether it ran over, and to facilitate you also in making settlements with your principals.

Q. Where are these boats that come into the State of Louisiana generally gauged by the State Inspectors?

A. Lake Providence is the State Line and they board them at Vicksburg I believe or may be Memphis for all I know, but they are presumed to gauge them after they reach Lake Providence. Some boats have been inspected during my tenure of employment when they would reach certain distances from a certain fleet but as a general rule they gauged the boats after they reach Lake Providence.

Q. After these boats are gauged at Lake Providence what becomes of the fleet?

A. Well, that fleet may be separated and certain boats left at one point and certain boats at another and so on; some came down here

o New Orleans, some may go to Vidalia and some to Bayou Sara nd some to Baton Rouge and some to Donaldsonville and some to New Orleans.

57 Q. Do some of these boats go out of the State after they have been gauged by the Louisiana State Gaugers, for instance, to the State of Mississippi.

A. Why, yes, some of them go over to Yazoo City. I can't testify o anything that goes on now. I don't know anything about the ompany's business at the present time.

Q. When these boats are sold to parties in the State of Mississippi after they have been gauged by the Louisiana State Inspectors ow are they sold?

A. By the Louisiana State gauge measurement.

Q. Who demands that?

A. The purchaser.

Q. It has been testified here that all these boats are consigned to Mr. Wilmot and taken in charge by Mr. Whann another agent of he company. If only part of a fleet has been gauged or if a fleet as not been gauged at all and subsequently after the fleet has become separated a boat is sold, or a full boat load, how is that boat gauged?

A. If it is sold by the full boat load it is gauged by the State Gaugers.

Q. In that case would not the State Gaugers have to go and gauge hat single boat?

A. They would be called upon to go and gauge it.

Q. If the entire fleet was not gauged, would, or would not there e a possibility for boats to escape gauging?

A. Certainly.

—. In the course of your business, can you state the reason why he inspection laws of the State were passed. Do you know anything f the reason for these gauging laws?

Mr. RICE: Objected to on the ground that the law is the law and speaks for itself. The court has nothing to do with the his-

158 tory of the law or the reasons which the witness may assign for the passage of the gauging acts.

A. The object of passing the law, as far as I ever learned, was for the protection of the purchaser. It insures him he is getting just what he bought.

Q. Prior to the passage of these laws these boats were sold without a gauging at least without a State gauging?

A. That is a matter that I could not answer, I understand they were but of my own knowledge I don't know.

Mr. RICE: Answer objected to on the ground that it does not purport to be a statement of witness's knowledge but hearsay.

Q. Mr. Whann has testified he has sold boat loads of coal to the Southern Pacific Railroad Company by the ton weight. Can you tell how that was settled for by Whann to the company and what means had the Agent in arriving at the correctness of the weight?

A. All those boats were weighed by the Southern Pacific Rail-

road when they were loaded [illegible] cars, that is, each car load was weighed and the totals of the cars taken from any given boat was footed up and compared with the gauge certificate and it showed whether there was a gain or a loss on the boat, what the actual weight of the cars alone was irrespective of the gauge or amount credited to the Coal company. The gauge was used to see whether there was an excessive shortage or discrepancy, if there was an excessive discrepancy why it was taken up by both offices, the Pittsburg office and the New Orleans office.

Q. Would that explanation also apply to the coal that was delivered in the yards for the purposes of the local trade?

159 A. Yes sir. Any great discrepancy would certainly be taken up in the same way.

Q. How is the coal taken into the yard or placed in the yard, taken to account, that is to say how is it credited, by weight or by gauge, if by weight how does the agent arrive at the weight of each identical boat?

A. When we take a boat load of coal and unload it into our yards, why, the gauge certificate of that boat was credited up to the coal company, that is, the amount shown in the gauge certificate was credited up to the coal company. Now, at the end of the season or at the end of each month, rather, why, the total footings of the weight of the sales for that month out of each specific yard, was footed up and turned into barrels at the rate of 11.9 barrels a ton and deducted from the purchases and deliveries put in the yard. At the end of the season the coal pile was either estimated or gauged, and any discrepancy in the way of shortage, why, that was charged to the coal company or suffered by them and any overcharge was accrued by them.

Q. After these coal boats are gauged by the Louisiana inspectors at the State Line and sold, would it be possible for any coal to be taken from the boats, either by a third person or by the company?

A. A tow boat might need coal and go there and fill its bunkers, but as a general rule they are coaled up before they are sent out. It has been a common case when they got into an emergency they would go there and coal. The Landing Superintendent is presumed to notify his principal, in fact, he is instructed to do so, as to any and all coal taken out of any specific boat.

Q. When that boat is sold, whatever would be taken out would effect the gauge would it not?

160 —. Yes sir.

Q. Do you know whether or not the system of gauging this coal in the Pittsburg District is the same as the system adopted by the Louisiana State Gaugers under the Louisiana law?

A. I think it is identically the same.

By Mr. Rice:

Q. Do you know personally anything about it?

A. Well, I know this much that they have taken the matter up through our office at one time and had the rules and the basis of gauging furnished them and they claimed they were going to establish them.

Cross-examination.

By Mr. RICE:

Q. When you were employed in Mr. Whann's office, was your employment in the office, or outside?
A. It was in the office.
Q. In what capacity?
A. Cashier and Bookkeeper.
Q. Did you have anything to do with the delivery of coal?
A. Well, to some small extent.
Q. To what extent?
A. I would occasionally order a boat out.
Q. All the outside work that you did, was the extent of ordering a boat out.
A. That is about all. Keeping in touch with the general business.
Q. What do you mean by that?
A. Knowing what boats were ordered out and I may say having a general idea about the business that was going on.

161 Q. Now what do you mean by ordering a boat out, was it to give an order on the custodian of the coal to deliver?
A. Yes sir.
Q. That was all?
A. Yes sir.
Q. What he delivered you did not know?
A. No sir, I did not.
Q. When did you leave Mr. Whann's employ?
A. I think it was about three years ago if I am not mistaken.
Q. Since then you have been in whose employ?
A. The Tutwiler Coal and Coke Co. for a while.
Q. In whose employ are you now?
A. My own.
Q. Have you ever been in the employ of the respondents in this suit?
A. I have been, yes sir.
Q. Well, why didn't you say so when I asked you the question in whose employ you had been since you left Mr. Whann?
A. I had been with them for a short while.
Q. This information you have given to day, you gave to them I suppose?
A. I hardly discussed the case at all, I gave them no information.
Q. You stated that the weight of a barrel of coal was 180 pounds. Do you mean that is the invariable weight?
A. That is the weight that is agreed upon by the coal men and the weight that the coal has always been sold to the best of my knowledge and belief.
Q. That was not the question I asked you. The question I asked was, is the weight 180 pounds the correct weight or is it simply the commercial weight for the purpose of selling and delivering?
A. It is the weight established by the custom, and used as a basis for delivering and selling.

162 Q. Do you know of your own knowledge whether that weight is exact or whether a barrel of coal varies from the weight of 180 pounds?

A. I don't know that.

Q. Now, will you please tell us in what respect the gauging of coal is of benefit either to the public or to the Monongahela River Consolidated Coal and Coke Co. or to the Texas & Pacific R. R. when coal is sold and delivered to that railroad by the ton, *X*, delivered in the cars which are weighed by the Railroad Co.?

A. The gauging of coal is a protection to the purchaser of the coal, and the benefit that may accrue to any individual is a matter that I could not explain.

Q. In what respect is it a protection to the purchaser?

A. It shows him he is getting what is sold to him and what he is paying for.

Q. Do you understand what I mean by the term broken package?

A. I understand what you mean, yes sir.

Q. I mean a part of a boat load of coal. Now, if you sell a man a part of a boat load of coal and deliver him a part of a boat load, of coal, how does the coal gaugers certificate assist him?

A. Well, as a general rule when a party, to my knowledge, buys a portion of a boat load of coal, he either gets the top of the boat or he gets the bottom. If he gets the top he wants to know how much has been taken out, if he gets the bottom he wants to know how much has been left in.

Q. Well, suppose he does not ask for the certificate?

A. Well, to the best of my knowledge he always has asked for it.

Q. Do you mean to say that sitting in your office knowing nothing except what goes on in the office, that you know that out of from 9 to 15 hundred boat loads of coal that are sold by the Monongahela River Consolidated Coal & Coke Co. every year, you can truthfully say when a part of a boat load of coal is sold, purchased by

163 weight or in any other way, that he calls for a gaugers certificate to see the amount of coal which he has obtained?

A. I have not testified to anything that goes on in all the offices of the Monongahela River Consolidated Coal and Coke Co. I know nothing at all, as I stated in my first testimony, about certain parts of their business. The only thing I am testifying about is what went on in the office with which I was connected, and what testimony I have given is in regard to the doings of that office and according to my knowledge and belief, and I cannot make it any more explicit.

Q. We will take the case of sales made to the Texas & Pacific Railroad Co.

A. I know nothing about that.

Q. Well, the Southern Pacific Railroad Co.?

A. The Southern Pacific bought their coal by the weight, by the ton. The coal is billed to them by the ton. They settled for it by the ton. During the period of my tenure in office, that was the system. When the coal was unloaded it was credited to the Monongahela River Consolidated Coal and Coke Co. on a voucher having the

weight and also the gauge showing any loss or gain that may have accrued.

Q. How did the gauge certificate of the gaugers protect the Railroad Co. the purchaser in such a case as that?

A. That I don't know.

Q. That is one of the cases in which you don't know. You can't state how the purchaser was protected?

A. I cannot tell.

Q. Well, now, give us an in-tance if you can, or instances, of persons who purchased boat loads of coal, and required for their
164 protection a regauging and a certificate of the coal gaugers to show what amount of coal was sold, when they sold it by weight?

A. I can't remember those things. I don't remember the customers even.

Q. You can't mention any?

A. I can tell you some of the people that bought by the pieces of boats but whether they took it by weight or not I can't tell.

Q. How about steamships?

A. As I stated before I know nothing about the steamship business.

Q. Did not Mr. Whann sell a good deal of coal to the steamship business.

A. Not during the time I was in his office, he never sold any to the steamships.

Q. Do you know how the amount of coal that was delivered to steamboats and steamships was ascertained?

A. No sir. I had nothing to do with it.

Q. You don't know then whether the gaugers' certificate served any useful purpose in that line?

A. I don't know whether they used them or not.

Q. You said that the coal coming down the river was to some extent sent out of the State and you mentioned Yazoo City?

A. Yes sir.

Q. Was that a large quantity of coal that was sent to Yazoo City or a small quantity?

A. It was a small quantity.

Q. How much in the course of a year so far as you know?

A. It might have been about four or five boats.

Q. Of what benefit to the purchaser is the coal gaugers' certificate for coal sold from the yards of the Monongahela River Consolidated Coal and Coke Co. in the City of New Orleans?

165 A. That is a matter I never looked into.

Q. That was not the question. I asked you do you know of any benefit?

A. No sir.

Q. Does the coal gaugers' certificate furnish any information for his protection to any person purchasing coal from the yard?

A. It has no part in the transaction whatever.

Q. You are dealing in what sort of coal now?

A. I am not dealing in any.

R. Tutwiler & Co. were dealing in what kind of coal?

A. They dealt in Illinois and Some Alabama.
Q. Is their coal gauged?
A. No sir.
Q. The Coal Gaugers do not gauge their coal?
A. No sir.
Q. Do you know whether it is a fact that much of the coal that comes here, remains at the coal landing for a long time?
A. Yes sir. It remains there a considerable time.
Q. What is the effect of the coal lying at a landing in a coal boat, the effect on the coal itself, does it not settle?
A. Yes sir, its cubic contents will lose in depth.
Q. Now, the gaugers' certificates are based on the cubical contents of the package, are they not?
A. When it first comes in the lines of Louisiana.
Q. Now, is that coal gauge made when the coal boat first comes into the State of Louisiana, a correct gauge of the cubical contents of the coal in the receptacle at the end of six months?
A. It is the correct gauge of the coal at the time it is made. Whether it is the correct gauge of the coal six months afterwards as a hypothetical matter, I could not answer. There may have been coal taken out of the boat or something else.
166 Q. Suppose no coal is taken out?
A. That is a presumption.
Q. What is?
A. That no coal is taken out.
Q. I say if no coal is taken out?
A. If no coal is taken out, a reasonable allowance should be made for settling.
Q. What is a reasonable allowance?
A. Why, I should think an inch would be a fair and reasonable one for six months in the year, an inch in the depth of the boat.
Q. Have you any practical experience in knowing what amount of shortage there is by time?
A. Not sufficient to pass an opinion.
Q. Have you ever known two gaugers to make a separate measurement of coal in a coal boat?
A. Yes sir.
Q. Do they always agree in quantity?
A. No sir.
Q. How much variance would there be?
A. Well, the variation I think would be, may be 100 or 150 barrels to the boat.
Q. Ever know cases where the variation was more than that?
A. Well, I believe I know of one case.
Q. The variation was what?
A. I don't know.
Q. Have you ever known cases where the variation was 500 barrels?
A. I think that variation applies to this case I am speaking about. There were several boats. There was quite a variation but what the exact variation was I don't remember, it has been some years ago, I don't remember but I know it was quite a variation.

167 Q. By which certificate would you sell the coal in such a case, under such circumstances, for the protection of the purchaser?

A. As far as Mr. Whann's office was concerned which I was connected with, we sold the coal under the correct certificate.

Q. When there was a discrepancy between the two which was correct?

A. That was a matter that was submitted to the Pittsburg Office, the original gauge, and the Pittsburg office passed on that gauge and if there was a great discrepancy they notified us to have a regauge taken and we had that regauge made and then submitted that to the Pittsburg office and after they passed upon it and if they said it was correct we accepted it in good faith and sold it in good faith as being correct on that certificate.

By Mr. McCaleb:

Q. Was that instance you refer to, during the terms of office of the present inspectors?

A. I really could not say, I cannot remember very well.

Q. You stated that if the coal in a coal boat which had been gauged, remained for about 6 months or a year, there would be a settlement of the coal. In cases of that kind would the purchaser ask for a regauge?

A. No, not as a general proposition.

Q. Would the company ask for a regauge?

A. No sir.

Q. You testified that you were in the employ also of the Tutwiler Coal Co. and that their coal was not gauged. How did their coal come into the city of New Orleans?

A. It comes in by rail.

Q. That is Alabama and Illinois coal?

A. Yes sir, and some Kentucky coal but very little.

168 Q. Since the institution of this suit it appears from the testimony of Mr. Whann that on or about the 6th of April of this year a tow of coal boats of the steamer John A. Wood came into the State of Louisiana and at the time that this tow arrived, only four boats of the tow were asked to be gauged. Now, if that tow contained or had 27 boats in all, and the balance of the boats, to wit: 23 boats, were not gauged, and some or all of these 23 boats were subsequently sold by the boat load, how could those boats be sold without the gauge? Could they be sold without the gauge by the Monongahela River Consolidated Coal and Coke Co.?

A. Well that would depend altogether on circumstances. They might want one of those boats for a railroad; they might want a boat to sell to the United Fruit Company. Of course in that case they would ask for a gauge.

Q. And if the boat they asked for a gauge of, which boat belonged to that tow, was not gauged?

A. Then they would have to have a coal gauger go and gauge it.

Q. Would or would not that embarrass the system of gauging?

A. It would make it more expensive for the coal gauger. He could just as well gauge the whole fleet at one time as he could to

travel to half a dozen different places to gauge half a dozen different boats that came down in that same identical fleet.

Q. Now, if there were several boats of that tow distributed along the Mississippi river within the State of Louisiana, would or would not this coal gauger have to go from point to point to gauge each boat where certificates were required?

A. Yes sir.

169 Q. What effect would that have upon the manner of inspection or manner of gauging?

Mr. RICE: Is the witness an expert in the matter of gauging coal?

Mr. MCCALEB: I am not asking that of him as an expert.

A. Well, it would make the task of gauging, as I have already stated, irksome and expensive to such an extent that it might have a tendency to make the gauger negligent in his haste to cover territory and get through with the work at the least possible expense.

Q. Wouldn't it embarrass the inspection?

A. Why, certainly it would embarrass.

Q. Mr. Rice asked you a question relative to the sale of coal made from the yards of Mr. Whann as the agent of the Monongahela River Consolidated Coal and Coke Co. and he asked you whether a gauge was of any benefit to the purchaser; I ask you whether or not the gauge in that case would be of benefit to the Monongahela River Consolidated Coal and Coke Co.?

A. Yes sir, it would benefit the Coal Company insofar as it would give them a check on their stock in the hands of the agent down here. They would know how much stuff had been put into the yard and the returns of the agent should account for that stock, or as close to it as reasonably could be expected.

Q. How many barrels of coal does it take to make a ton of coal?

A. Lump coal, it is 180 pounds to the barrel which would mean 11 1/9 barrels to the ton. Now in mine run coal it depends altogether on the way the coal is sold. If it is sold by the ton, it is 2,000 pounds, if it is sold by the barrel, as far as my knowledge goes, it has been 180 pounds to the barrel or 11 1/9 barrels which is the same.

170 Q. Would the purchaser of the coal by the ton, if he asked for a gauge certificate, get any check upon the weight of the coal. In other words if he bought coal by the ton and he had a gauge certificate wouldn't that gauge certificate tell him whether he got the requisite amount of coal in weight?

A. It would be a guide to him, it would be a method of seeing whether he got approximately what he purchased.

Q. You say you have also been in the employ of the respondents, do you mean Messrs. Knop and Rock?

A. Yes sir.

Q. For how long?

A. About 2 years, I am not quite positive.

By Mr. RICE:

Q. Referring to your last examination I wish you would elucidate this. You have got a gauger's certificate of the quantity of coal in a boat. Now, I sell out of that boat on an order from a steamship, and deliver to the steamship, say 500 tons and deliver it. Now, will you tell us in what respect the gauger's certificate assists the master of the steamship to know what quantity of coal he has got?

A. I can hardly answer that question for this reason, I don't know what means he has of ascertaining what coal he got.

Q. It is sold by the ton?

A. He may have means of ascertaining whether he got a ton or not, I don't know.

Q. That is your only answer to it?

A. Yes sir.

Q. A planter purchases, gives an order for 500 barrels of coal to be delivered out of a coal boat upon his plantation. In what
171 way does the certificate of the gauge measurement assist him in ascertaining what quantity of coal he has got.

A. Well, a boat may have come there with 2,000 barrels, he only wants 500 and when that approximate 500 is taken out the boat is regauged, the difference between the regauge and the original gauge shows the quantity left in the boat, and what is taken out.

Q. The next man I sell 50 tons to?

A. The same answer applies to that.

Q. And so on until it is peddled out?

A. You would have to regauge it every time.

Q. For the same reason, no matter how large or how small, that is your idea?

A. In answer to your question I am taking the reason. I am not taking the quantity, I am taking the reason for the gauging. The same reason applies.

Q. Did you ever know the process of regauging to go on where the coal boat was peddled out along the coast to planters, rice planters?

A. Well, I believe it is, to a certain extent.

Q. I did not ask you that question. I asked you if you ever knew of a case?

A. No, I can't recall any case.

Q. Don't you know it would be absurd to require anything of the kind or to undertake to practice anything of the kind?

A. I know it would be an expensive proposition.

Q. You spoke sometime ago of it embarrassing the coal gaugers to inspect a full boat load of coal which might be at one of the different landings. Would it not embarrass him in the sense you use the term, a good deal, to be called upon to inspect a coal
172 boat every time a small quantity of coal was sold out of the coal boat?

A. That embarrassment would return a revenue to him, whereas the other would not.

JOSEPH L. ROCK, one of the defendants, sworn and examined, testified as follows:

Direct examination.

By Mr. MCCALEB:

Q. What is your name?
A. Joseph L. Rock.
Q. You are one of the respondents in this case?
A. Yes sir.
Q. When were you appointed Coal Gauger?
A. January 1st, 1905.
Q. Have you been performing your duties since th-t time?
A. Ever since that time.
Q. In conjunction with whom?
A. With Mr. Louis Knop.
Q. He is the other respondent in this case?
A. Yes sir.
Q. Since your incumbency in office as one of the Coal Gaugers what boats of coal have you gauged, to whom did they belong?
A. I made out all the Gaugers' Certificates to Mr. R. J. Whann as agent.
Q. For whom?
A. For the Monongahela River Consolidated Coal and Coke Co.

173 Q. Have you gauged any boats belonging to any other company since that time?

A. In the early part I gauged some boats for Jutte & Co. represented by Jung & Sons.
Q. Do you know if Jutte & Co. are still in the business?
A. No sir, as I understand it they are out of the business.
Q. Were you notified by any other company outside of Jutte & Co. or the Monongahela River Consolidated Coal and Coke Co. to gauge boats?
A. Yes sir, here of late, this year, that is, a month or so ago, by the West Kentucky Coal Co. represented by W. N. Sims agent, Donaldsonville, La. and also by W. O'Day at Baton Rouge.
Q. Prior to that time for whom did you gauge the boats?
A. For the Monongahela River Consolidated Coal and Coke Co.
Q. And Jutte & Co.?
A. Yes sir.
Q. Could you approximate the percentage of boats gauged by you and Mr. Knop for the Monongahela River Consolidated Coal and Coke Co. as compared with the boats gauged for Jutte & Co.?
A. About 90%. Jutte & Co. have had very little coal coming down here during my incumbency.
Q. Where are these boats gauged?
A. We gauge them at all points between Greenville, Bayou Sara, Baton Rouge, sometimes, of course, we miss our boats, we may go up as high as Greenville and miss them and come down and try and meet them at Vicksburg and Natchez, anywhere before we think they will break up their tow.

Q. Do you gauge these boats on notice sent to you by the Monnongahela River Consolidated Coal and Coke Co.?

A. Yes sir, they give us notice when ever they are about to cross the State line.

174 Q. That is the requirement of the law?

A. Yes sir, that is, since the filing of the suit.

Q. When you received a notice from the Monnongahela River Consolidated Coal and Coke Co. through their agent to gauge their boats, how do you proceed.

A. Some times they send us a notice that the boat has passed such a point. They may not tell us to gauge any boat at all, they might not have anything on there they want to gauge, they simply say the boats passed such a point. If the have any coal there they want gauged they might designate those by numbers, might ask us to gauge the following boats or ask us to gauge the whole tow. That is for their future convenience.

Q. That has been since the filing of this suit?

A. Yes sir, it has always been.

Q. When they designate the number of boats and the marking of the boat what do you do under that designation, do you issue a certificate to them?

A. We issue a certificate and they pay us cash for that, for only those they have designated; we issue certificates for 4 or 5 or 10, whatever they might designate, give them a certificate for them and they pay us immediately.

Q. As I understand you, you gauge the whole fleet?

A. Yes sir.

Q. And you issue them a certificate for the boats of that fleet as they ask for it?

A. Yes sir, as they call for it. They won't take the other certificates. We offer them but they won't take them.

Q. If you should gauge the boats which they designate and not gauge the balance of the fleet what would be the result?

A. There would be a great deal of trouble for us because they may leave some boats at Lake Providence, Vidalia, Bayou

175 Sara, Baton Rouge, Philadelphia Point Donaldsonville or probably all along the line, at different places along the line. Now, if afterwards they would want to sell one or two of those boats, they might sell one at Vidalia, one at Lake Providence, we would have to go all along the river to find these boats to gauge them. That would be a lot of expense and inconvenience.

Mr. RICE: Question and answer is objected to on the ground that the rights of the parties in this suit are not to be determined by the convenience or inconvenience of the officer.

A. You remember I stated it was the convenience of the company as well as for the officer.

Q. Your gauging of the whole fleet of boats at the State Line is for whose convenience?

A. For all concerned, for our convenience and also for the Monnongahela Coal Co.'s convenience, or whoever the coal is consigned to, the agent.

Q. Does it not frequently happen that boats after they have passed the State Line are sent up the Atchafalaya river *river* and stop at Angola?

A. Yes sir.

Q. And the Teche. How does that effect the workings of the inspector and of your department and does it not facilitate the delivery of that coal by the shipper?

A. It does, it helps the *the* shipment of the coal, it facilitates the convenience to the shipper.

Q. Now, if you only gauge a part of a tow as designated by the complainant company, and not gauge the balance of the tow

176 what possibilities would arise in that case?

A. Well, it would—we wouldn't know where that coal is, where those boats went to unless the company was willing to tell us where they went.

Q. Would, or would it not be possible for those boats to be sold and thereby escape gauging?

A. It would. They could be sold without our knowing anything about it, or having any gauge certificate issued at all.

Q. In that case, would or would it not be a benefit to the purchaser?

Mr. RICE: This question and all other like questions are objected to on the ground that it is a matter purely conjectural; no evidence has been introduced whatsoever to show that any coal has been sold or disposed of without having been gauged by the inspectors.

A. Not to the purchaser, it might be a benefit to the vendor.

Q. In other words if the Monnongahela River Consolidated Coal & Coke Co. would sell a boat load of coal without your gauge certificate there would be a possibility of the purchaser receiving less coal than what he bought, would there not?

Mr. RICE: The question objected to on the ground that it does not appear either as a fact or as suspected that the Monnongahela River Consolidated Coal & Coke Co. has acted in the manner suggested by the question.

A. There would.

Q. Do you make memorandums of your gauging?

A. Yes sir, I keep a record of all our gaugings.

177 Q. I show you two books and ask you if these books contain memorandums of your gaugings?

A. Yes sir, those are complete records of all the coal gauging by Mr. Knop and I, they are gauge records kept by myself.

Q. Now, referring to one of your books, book for the year 1907, I note that you gauged the tow of the J. B. Williams on February 17th 1907; that that tow contained 29 boats of coal, one boat of coke and one barge. By referring to this book, will you state if that is correct?

A. Yes sir, that is correct. Those are my figures.

Q. At the time that tow came into the State were you notified by the Monongahela River Consolidated Coal and Coke Co. to gauge the tow?

A. Not to gauge the tow. We were notified that the tow passed Lake Providence.

Q. How many boats of that tow did they ask to be gauged, did they designate?

A. 11 boats. They numbered the boats.

Q. Give the numbers of the boats?

A. 9509; 9223; 9387; 9252; 9482; 9467; 9556; 9515; 9445; 9269; and 9524.

Q. Did they pay you for the entire tow, or those 11 boats?

A. Those 11 boats, $110 or $10 a boat.

Q. How much were you entitled to for gauging the whole fleet?

A. $305.

Q. For the 29 boats?

A. 29 boats, one coke boat and one barge, taking the boats at $10.00 each and the barge $5.00.

Q. You issued certificates to them for these 11 boats they designated?

A. Yes sir.

Q. What became of the fleet after you gauged the whole tow?

A. They land- here around 9 mile point, what they call

178 coalport.

Q. Was that fleet separated in any way?

A. Of course, I can't say where they all went to, the supposition is they landed up there, but where they went afterwards I don't know, they may have gone to different landings.

Q. Afterwards did they ask you for a certificate for any boat of that fleet?

A. Yes sir, on Mar 6th they asked us for a certificate.

Q. That was how long after the gauging?

A. From February 17th to March 6th, and April 17th they asked for one.

Q. What was the number of the boat?

A. 9419.

Q. Did they ask you for another certificate?

A. On March 6th and on April 17th they asked us for 9214; on May 1st, same year, they asked us for 9076, 9090, 9417, 9489, 9502, 9346, 9511, seven boats, on May 1st. Then on June 17th 1907 they asked us for 9523, and on August 30th 1907 they asked us for 9497. All these boats they had to give us an order on our bondsman to get that pay back from them. We already had deposited that money with our bondsman Mr. Capdau so we had to get an order from them to get that money for them.

Q. From the time you gauged the entire fleet up to the time of the last designation——

A. February 17th was the first certificate and the last certificate was August 30th.

Q. About how many months?

A. Six months and a half, about.

Q. To whom was this entire tow consigned *to*?

A. I couldn't say who it was consigned to. I can only say who I make the certificates out to. It might have been consigned to

Wilmot or to Whann; I believe it is all consigned to Wilmot, that is only my belief, but I make all the gauge certificates out to
179 Mr. R. J. Whann as agent of the Monongahela River Consolidated Coal and Coke Co.

Q. If you had only gauged the boats designated by the company on February 17th and did not gauge the balance of the fleet and you were requested to issue certificates for the other boats which they subsequently designated what would you have to do?

A. I would then be at the mercy of the Monongahela River Consolidated Coal & Coke Co. or the agents of the company to find out where those boats were. They might have gone to Baton Rouge, Donaldsonville or somewheres else I could not say. I would not be able to find them.

Q. Wouldn't you have to go and gauge them at the points specified by the agents?

A. Yes sir. I would go whereever they wanted me, whereever they pointed out. I couldn't find them unless they pointed them out.

Q. And if they failed to request a certificate of those boats subsequently designated, would or would there not be a possibility of the company disposing of these boats without a gauge certificate?

Mr. RICE: Objected to on the grounds that no foundation has been laid for the interrogatory.

A. Sure, they could easily do that.

Q. In that event what would be the position of the purchasers of those boats?

Mr. RICE: Objected to on the ground that it calls for simply a conjecture on the part of the witness.

A. Of course he would be at the mercy of any one that took the boat out. Whatever he would sell it to him for he would have no proof of what it contains.

180 Q. "I show you a letter from Mr. Whann addressed to Knop & Rock State Coal Gaugers, of date April 6th marked D-1, and ask you if you received that letter?

A. Yes sir, I received that letter.

Q. When you received that letter did you gauge the whole fleet of boats?

A. I did.

—. And you issued four certificates under the designation——

A. They designated four boats and I issued certificates ther-for.

Q. Please look at your gauge book showing the gauge of that fleet and state how many boats it contained?

A. I gauged 27 boats in that fleet.

Q. Did they ask for certificates afterwards at any time?

A. After the first designation of 4 boats?

Q. Yes?

A. They did. April 9th they asked for a certificate for boat No. 9539. April 10th they asked for 10,403, May 6th, 10407; May 16th 10,367; May 21, 10370. That makes five boats they asked for afterwards.

Q. Would your testimony relating to the tow of the John A. Wood of April 6th and of the J. B. Williams, apply to all cases?

A. Yes sir. It applies to all.

Q. That is, as I understand all your testimony, refers to the gauging since the institution of this suit?

A. Yes sir.

Q. Prior to this suit how was that business carried on?

A. Then we would watch the newspapers and see whenever a tow came down and go and get it. They never would notify us unless it was very important, then they would tell us but most of the time we knew it.

Q. You would gauge the entire fleet?

A. Yes sir.

Q. When and how would you issue your certificates?

181 A. As soon as I had time to make them out I would issue them and they would take them and pay us. They made us wait a few days until they sent them up to Pittsburg and compared our certificates with theirs, and if there was any errors of course they would ask us to correct them.

Q. Did you at any time go down to Yazoo City under instructions from the complainant company to gauge boats for them?

A. Yes sir, on several occasions.

Q. Did you go to Vicksburg?

A. Yes sir, we went to different places, Vicksburg, and Natchez. My partner also went to Natchez, sometimes my partner would go and sometimes I would go.

Q. To whom were these boats sold?

A. Yazoo City and Vicksburg, Yazoo City they were sold to the Oil Company over there, I can't remember the name, because that did not concern me at all who they were sold to. I made out the certificates to R. J. Whann, and also to the Ice Company over there they were sold to.

Q. Is it not a fact that purchasers in Mississippi demand the Louisiana State Gauge?

A. That is what they call for, the Louisiana State Gauge, they don't want any other gauge, they don't want any Louisville gauge but the Louisiana Gauge.

Q. What do you understand by regauging?

A. Regauging is when our gauge measurement comes in conflict with the Pittsburg measurement. Our gauge may call for 26000 bushels while their gauge may call for 27,000 bushels; then they will ask for a regauge.

Q. Who will?

A. The Pittsburg company or their agents.

182 Q. Do you mean the Monmongahela River Consolidated Coal & Coke Co.?

A. Yes sir, their agents, they will send an expert along with us by the name of Mr. Tremoulet and at one time Mr. Schneidau a brother of the gentlemen that testified here yesterday, he goes along with us and he takes a gauge and so do we, he submits his of course and we submit ours. If we are found in error we are not to be paid

for that regauge and if our gauge is found correct on the regauging we get paid for that regauging. It happens that we always got paid for our regauging so consequently we must have been always right on our gauges.

Q. Do you know of any instance when your gauge was wrong?

A. None at all that I know of. As we have always been paid for our re-gauging our gauges must have been right. If we were wrong they would not pay us for it. Our original gauge was accepted?

Q. On the regauging was your gauge and that of the representative of the company the same?

A. There may have been a difference of probably 10, 12 or 15 barrels, which made no difference. They make an allowance of 50 or 60 barrels either way, probably more.

Q. Then I understand from your testimony the regauging tall*e*yed approximately with the original gauge?

A. It did.

Q. And both you and the gauger of the company agreed?

A. Agreed to that extent like I say approximately.

Q. Mr. Rock, is there any relation between the weight and the gauge and the measurement of coal?

A. Well, that I couldn't say, I don't know their weight up there at all, there may be a difference.

183 Q. I want you to tell me how you gauge these boats, what is the system of gauging?

A. The system of gauging is to get its cubical contents in cubical inches, we then take 4% for tare, that is, for timber voids.

Q. Do you take anything off for rake?

A. We take 1 foot off for rake. We then divide that by 2688 which means cubical inches to the buchel. Then we divide the remainder by 2.6 bushels to the barrel. Now, we get no weight at all, we get no tonnage, we only get the measurements in bushels and barrels and the cubical inches.

Q. I show you a document marked D-3 and ask you if that is the form of your certificate and the method pursued. Does that represent the method pursued in gauging.

A. Yes sir, that is the regular gauge certificate.

Q. Now, that certificate shows the gauging of what boat?

A. Boat No. 10346 from the tow boat Spragne which we gauged on March 14th.

Q. Were you, at any time, requested to regauge that boat?

A. If you term it regauging, yes. This is the first gauge of the full boat. On May 12th we were called upon to gauge the residue of that boat, some coal that had not been sold out of it, about 1000 barrels had been taken out. So we went and gauged it and found that the first measurement was 113 inches deep and the second measurement was 96 inches.

Q. In other words, after you gauged that full boat load some of the coal was disposed of, was taken out by the Monnongahela River Consolidated Coal & Coke Co. and they asked you to gauge the residue?

A. Yes sir.

184 Q. Now, I show you document marked D-4 and ask you what does that show?

A. That shows that on May 12th 1908 they asked us to gauge the residue of Boat 10,346.

Q. Is that the boat referred to in the original certificate?

A. Yes sir. I still had the original gauge. They had not applied for the original certificate. They only asked me to gauge the residue of that boat. I then found it 96 inches deep for which I have put the number of barrels on that piece of yellow paper.

Q. Then this document marked D-3 is the certificate of gauge of that boat No. 10,346.

A. Yes sir.

Q. And document marked D-4 is the gauging of the residue of that boat after some of the contents of that boat had been taken out?

A. Yes sir.

Q. Was that second gauge or gauge of the residue requested by the Coal Company?

A. By their agent Mr. Whann.

OFFER.—Mr. MCCALEB: I offer in evidence these documents marked D-3 and D-4.

Q. At the time of your gauging this boat 10,346, that boat was a part of the fleet of the tow boat Sprague was it not?

A. Exactly.

Q. You gauged the entire fleet?

A. Yes sir.

Q. And this boat was part of that fleet?

A. Yes sir.

Q. Now, at the time of your gauging the entire fleet did the Monongahela Coal Company designate that boat No. 10,346?

A. It did not.

185 Q. Then afterwards they asked you for a certificate on March 14th?

A. No, they did not ask me for any certificate. They simply asked us to go and gauge the re-sidue of that boat.

Q. This document marked D-4——

A. Is the residue of the boat.

Q. You gauged the residue of the boat on May 12th?

A. Yes sir. They had sold part of the coal in that boat and they asked us to gauge the residue of it.

Q. So part of the boat was sold without a certificate?

A. Yes sir. There is the certificate still in my possession.

Q. That certificate is still in your possession and no certificate of the gauge of the whole boat was ever issued to the company?

A. No sir.

Q. Is it or is it not the fact that they designate boats that form part of a fleet, after the gauging at the State Line?

A. They do.

Q. Does that fact show that the company has not sold that part of the fleet or any part of the fleet either by weight or measure until some time after the fleet had crossed the State Line?

Mr. RICE: Objected to on the ground that the question calls

simply for a conjectural answer, that the matter is a question for the court and not for the witness.

A. It would show that the company does not know where these boats are, designated, they don't know whether they are going to be sold by the boat or barrel when they enter the State Line.

Q. There was some testimony yesterday by Mr. Wood relative to some Alabama coal coming down the river which had not been gauged; what have you to say about that?

186 A. Not during my incumbency. We found sometimes there was some that come from Alabama or Kentucky which we call Caseyville. If any got in it must have been smuggled, because we were not notified. We found sometimes that way, in a fleet, that some coal come from Caseyville, Kentucky, but we always gauged it though.

Q. Don't you and Mr. Knop gauge this Alabama coal when it does come down the river?

A. We gauge everything that comes down the river no matter what it is.

Q. Referring to the letter marked D-1 which I show you, there appears to be a balance due you and Mr. Knop of about $2100 approximately, at the time that this letter was sent, March 24th 1908? Is that correct?

A. Yes sir.

Q. This sum of $2100 is due you and Mr. Knop for boats which have not been designated and marked up to that time?

A. Yes sir;

Q. And which boats you have gauged either as a whole or a part of fleets as they came down the Mississippi river?

A. Yes sir.

Q. And that was after the bond of $5,000 had been given in this case?

A. Yes sir, that is over and above the bond of $5,000, which is, to day, of course, more. That is up to that time.

Q. As I understand, under the order of court you and Mr. Knop gave a bond of $5,000 to protect the Monongahela River Consolidated Coal and Coke Co. during the pendency of this suit?

A. In the event of the finality of this suit.

Q. They have paid over $5,000 to your bondsman?

A. Yes sir.

Q. And there is the sum of $2100 approximately due March 24th 1908 in addition to the $5,000 paid to Capdau your bondsman?

187 A. Yes sir. I made a verbal demand on him for the money and he told me to reduce it to writing, send him a letter to that effect, and he would put it in the hands of his attorney.

Q. I show you the document D-5 and ask you what that is?

A. That is the residue of that same boat we have just spoken of, 10,346 which coal was sold out of it without asking for the original gauge. After some part of that coal had been taken out they asked us to gauge the residue. We then found 8446 barrels. The original gauge was 10,023 barrels, a difference of 1577 barrels. My original

gauge to that date when they asked us to regauge it, they had taken out 17 inches of coal. The average barrels to the inch is between 86 and 90 barrels to the inch in depth.

OFFER.—Mr. MCCALEB: I offer in evidence documents marked D. 3, D-4, and D-5 in connection with the testimony of the witness. For the sake of not encumbering the record and as a convenience I offer in evidence the specimen of gauging taken from the memorandums of gauging referred to by the witness, page 13, of the tow Joseph B. Williams, and page 13 of the tow John A. Wood. The Joseph B. Williams gauge was made April 8th 1907 and the John A. Wood April 4, 1908. The Joseph B. Williams gauge was made April 8th 1907, and the John A. Wood April 4th 1908. And it is understood and agreed between counsel, that the memorandums of all their gauging will be approximately the same as in these two instances.

Cross-examination.

By Mr. RICE:

Q. When called on by an agent of the Coal Company to gauge a boat of coal then in one of its coal fleets do you go to the
188 fleet to gauge it?

A. Yes sir, wherever they designate the boat to be.

Q. So that the gauge which you made when it entered the State is of no account?

A. If they ask us to regauge?

Q. When a coal fleet arrives in the State you meet it and gauge every boat in it?

A. Yes sir.

Q. That fleet of coal boats comes into the State and the coal boats are placed in some of the coal fleets of the complainant. Now the coal company wants to take one of those boats out of the fleet and asks you to gauge it, do you go to the coal fleet and gauge it or use one of your certificates which you have made of the gauge at the time it came into the State?

A. We give them one of our certificates which we had already made.

Q. In other words you do not go to the coal fleet?

A. No sir.

Q. You take the certificate which you have prepared at the time of gauging the boat when it first entered the State?

A. Yes sir.

Q. I understand then, that the gauging which you make when the coal enters the State serves for all subsequent requirements unless you are required to regauge the coal?

A. It does.

Q. You have mentioned one coal boat which seems to have been removed from the coal fleet without you being required to furnish the gauger's certificate for it?

A. Yes sir.

Q. In what coal fleet was that boat?

189 A. That was the coal fleet of the Sprague which we gauged on March 14th. There is the certificate there to show.

Q. In what coal fleet, at what coal landing was it?

A. I don't know. We gauged it coming down the river in the tow of the Sprague.

Q. Do you know at what coal landing that coal boat had been placed?

A. I was told by the captain of the boat they were to be landed at Coalport; of course I could not say positively whether they did land there.

Q. Coalport is 9 mile point?

A. That is a little above Coalport.

Q. Where was that coalboat at the time you were called upon to gauge it?

A. At Algiers, at what they call Brown's landing.

Q. Do you know, as a matter of fact that it was by accident that that coal boat was removed from the fleet?

A. I don't know anything of the kind.

Q. There was no explanation made to you?

A. No sir. I had called their attention to it. They did not ask for the original gauge, and they said they did not want it.

Q. Who said that?

A. Mr. Whann the agent, I called his attention to it, that he had never inquired for the original gauge and he said he did not want it.

Q. How many times did you ever go to Yazoo City to gauge coal?

A. Two or three times.

Q. If you had gauged that coal when it first arrived within the State, why was it necessary——

A. We didn't gauge that, that coal was consigned to Captain Comeron of Vicksburg, Miss. If we go on a tow and they tell us this boat is consigned, to Vicksburg or Natchez we don't gauge it. That belongs to Mississippi.

Q. Then the coal you gauged in Yazoo City was coal that

190 was consigned to the State of Mississippi?

A. Yes, sir.

Q. And you went to Yazoo City to gauge it simply for the convenience of the coal company?

A. Of the purchaser. They called for the Louisiana Gauge.

Q. And it was entirely outside of your business as a Louisiana State Gauger?

A. We could have refused to go if we had wanted to. But of course that company also requested us to go there? Mr. Whann asked us to go there.

Q. The company paid your expenses for the gauging?

A. Yes sir.

Q. As well as your gauger's fees?

A. Yes sir.

Q. Your service was just exactly as if you had been asked to go over to Mobile and gauged a barge of Alabama coal there?

A. Same thing?

Q. A good deal of coal comes here from Illinois does there not. Plenty of coal comes here from Illinois?

A. Not that I know of. A good deal comes from Alabama, not by river, that I know of.

Q. That was not the question I asked you?

A. May be now and then a few boats that have been loaded up along about Greenville from Alabama, loaded up in boats.

Q. Do you gauge them?

A. Yes sir, we gauge any boat that comes down here.

Q. How many coal boats of Alabama coal from Greenville have you gauged since you have been a coal gauger?

A. I couldn't tell you that. I never kept a record of that. It comes in the fleets of the Monongahela Coal Co.

191 Q. Where do you gauge that?

A. We gauge that in the tow of the Monongahela Coal Co. Towboats in the fleet.

Q. You don't gauge that——

A. Not at Greenville, no sir.

Q. Whose coal is it do you know.

A. I don't know whose coal it is.

Q. Do you know that the Monongahela River Consolidated Coal and Coke Co. is not the owner of it?

A. It gets into their tows and if they designate it they pay for it.

Q. Who, Mr. Whann?

A. Yes sir.

Q. Have you gauged Alabama coal?

A. Yes, sir, if it is in their fleet, certainly, I never gauge outside of it.

Q. What fleet do you refer to.

A. I don't mean at the coal landing. Coming down with the fleet, the fleet comes from Pittsburg and stops at Greenville and takes them along.

Q. That is all you know in regard to the ownership.

A. As far as Alabama Coal is concerned.

Q. What was your occupation before you became a coal gauger?

A. Deputy State Assessor of the Second District, I was Chief Clerk there for 12 years.

Q. Are you in any other business now than that of coal gauger?

A. No sir.

A. A great deal of Alabama Coal comes here by rail does it not.

A. I presume so. I don't know that.

Q. Do you mean to say you don't know that Alabama coal comes here by rail?

A. I never paid any attention to that. I think it does, but I don't know it positively. I have never been out there to inquire about it.

192 Q. You never had the curiosity to inquire?

A. No sir. I know that coal comes by rail but I never asked where it comes from, whether it comes from Alabama, Kentucky or where.

Q. And yet you have been State Coal Gauger since 1905, one

whose duty it is by the law, to gauge all coal coming into the State, and yet you don't know that any coal has come from Alabama into the State by rail?

A. Not positively.

Mr. McCaleb: Objected to as totally irrelevant.

By Mr. McCaleb:

Q. You were asked about your present business. Don't you give all your time and attention to your gauging business?

A. Yes sir, all my time and attention is to that.

Q. To the gauging of coal boats?

A. Yes sir, that is all.

Q. Under your appointment from the Governor?

A. Yes sir.

Q. Now, you were asked something about expenses. Does this sum of money which is due you and Mr. Knop amounting in all up to March to about $7100, represent the net amount you have made since the filing of this suit?

A. No, sir, it does not mean the net amount.

Q. Are you and Mr. Knop required to pay your own expenses?

A. Yes sir.

Q. What do those expenses consist of?

A. Railroad fare, hotel bills, hiring men to drive the rod, we hire very often, we have to ride 15 or 25 miles in *b*acks and pay nine, ten and even as high as fifteen dollars for a hack, hire. I ride up in buggies to meet a tow up the river. We can really say our expenses will reach from 30 to 35 per cent. of the gross amount that we receive for gauging.

193 Q. If you were to be paid only for boats designated by the Monongahela River Consolidated Coal & Coke Co. as they propose by this suit, would the operation of your office be conducted at a gain or loss?

Mr. Rice: Objected to on the ground that the question is wholly irrelevant. The question involved in this suit is a question of law

A. At a loss.

Q. In other words the compensation you would get for the few boats which they would designate would not pay for the inspection?

Objected to for the same reason.

A. It would not pay.

By Mr. Rice:

Q. What would be the necessity for two gaugers if there was less work to do?

A. I don't understand the question.

Q. There are two of you who do the gauging are there not?

A. Yes sir.

Q. Suppose there was half of that quantity of coal to be gauged could not one of you do it.

A. We would have to reduce down to one.

Q. Then one would be superfluous?
A. I would think so.
Q. When a coal fleet say of 35 boats, arrives within the limits of the State, and you are notified of its arrival, how long does it take you to go to the place where the coal is to be gauged..
194 A. That is very hard to say. Sometimes those boats do not run regularly.
Q. The question how long does it take you to go from the City of New Orleans to the place where the coal is to be gauged?
A. We don't know where it is to be gauged. We may go expecting to meet the boat at Greenville, and have to wait there.
Q. Suppose you meet it at Greenville. It takes you from quarter to 3 until half past 12 that night to get to Greenville and the next morning you meet the tow?
A. Probably you may not meet it?
Q. Suppose you do you immediately proceed to gauge the coal?
A. Yes sir.
Q. How long does it take you to gauge a coal fleet of 35 boats?
A. Say from 4 to 5 boats an hour.
Q. Do you measure the length of each boat?
A. Length, breadth of each boat. We measure the length and breadth of each boat by a tape line and the depth by a rod.
Q. That you do for each and every boat in the fleet?
A. Yes sir, or barge.
Q. So, you can, in 110 hours gauge 40 to 45 boats?
A. Yes sir, 45 to 50 boats, that is, with the assistance of two men which we use to drive the rod and hold the tape line etc. It takes two men to drive that rod.
Q. Do they go with you?
A. I usually take men from the fleet.
Q You don't pay them anything?
A. Yes sir, I pay them 25 cents for every boat or barge.

ADMISSION.—It is admitted that if Mr. Knop was sworn as a witness he would testify substantially the same as Mr. Rock. But this admission is made to be used as evidence in lieu of the testimony of Mr. Knop.

195 DOCUMENT MARKED "DEFENDANT 1."

Offered and Filed June 9, 1908, *nunc pro tunc*.

NEW ORLEANS, LA., *March* 24, 1908.

The Monongahela River Consolidated Coal & Coke Com. (through R. J. Whann, agent), city.

DEAR SIR: When your Company sought to injoin us from gauging coal on certain boats and barges, the Court refused the injunction and ordered us to furnish bond in the sum of five thousand dollars ($5,000) which we did.

As you are aware, all fees, due us since the order of the Court was entered compelling us to furnish the bond above referred to, were turned over to our bondsman, Mr. P. A. Capdau, and your checks were made out accordingly.

Now, Mr. Capdau has been fully protected by reason of there being turned over to him, as aforesaid, the sum of five thousand dollars, ($5,000.00).

There is a surplus now due us and in your hands amounting to the sum of twenty one hundred dollars, ($2100.00), approximately.

We would request that you pay us this amount, as same is due us and there is no reason for your withholding same.

We would further suggest that in the event of your paying us the said surplus, that your action would not be considered by us as a waiver of your rights in anywise, the rights of both plaintiff and defendant being reserved to them as when the suit was originally filed.

We sincerely trust that this proposition will be accepted by you.

Very truly yours,

____ ____,
____ ____,
State Coal Gaugers.

196 *Document Marked "Defendant 2."*

Offered and Filed June 9, 1908, *nunc pro tunc.*

All agreements contingent upon strikes or other causes beyond our control.

The Monongahela River Consolidated Coal and Coke Co, Pittsburg, Pa., Represented by Robert J. Whann, Agt., Coal and Coke, 205 Carondelet Street.

NEW ORLEANS, *April 6th*, 1908.

Messrs. Knop & Rock, State Coal Gaugers, City.

GENTLEMEN: You may gauge the following boats of coal which arrived in the tow of the Str. "Jno. A. Wood" on April 4th:

R. C. 10319 New Orleans,
10358 "
10432 "
10366 "

Yours respectfully,

MONONGAHELA RIVER CONS.
COAL & COKE CO.,
ROB'T J. WHANN, *Agt.*,
By J. SCHUEIDER.

197 *Document Marked Defendant* 3."

Offered and Filed June 9, 1908, *nunc pro tunc.*

Louis Knop,
Residence, 620 Elysian Fields Ave.

Jos. L. Rock,
Residence, 2325 Carondelet Walk.

Knop & Rock, State Coal and Coke Gaugers, 327 Carondelet St.
812 Union St., 2nd Floor.
Telephone 4101.

NEW ORLEANS, *M'ch 14th*, 1908.

Dimensions and Contents of Boat per Towboat Sprague.

Marked R C No. 10346; Gauged at Coal Port; Certificates to Mr. R. J. Whann, Agt.

Long.	Wide.	Deep.	Bulkheads.
1914"	312"	113"	B. H. No. 1 80 X 312 X 110 B. H. No. 2. 80 X 312 X 110

1914 X 312 X 113 = 67479984
B. H. 1. 80 X 312 X 110 = 2745600
" 2. 80 X 312 X 110 = 2745600

Gross Cubic Inches..... 72971184
Tare " " 4%..... 2918847

Net " " 70052337

70052337 260611 Bushels.
2688
260611 10023 Barrels.
26

J. LEWIS ROCK,
State Gauger.

198 *Document Written in Pencil Marked "Defendant 4."*

Offered by Defendants and Referred to in Their Note of Evidence.

50. MAY 12, 1908. (D⁴.)

Marks —.
No. 10346.

Length.	Breadth.	Depth.
160–6	26	97
1	—	
—	312	100
159		96
12	96	93
—		92
1914		94
		96
		100
		—
		768
	Bulkheads.	
A V.		
1.		96
76		97
=		=
A V.		
(2)		
78		88

199 *Document Written in Pencil, Marked "Defendant 5."*

Offered by Defendants and Referred to in Their Note of Evidence.

(D⁵.)

Piece Boat 10346.

1914
312
3828
1914 9/
5742
597168
96
3583008
5374512/
57328128
2300064
2141568
61769760
4
2470790[40]*
61769760
2470790
59298970
5376
5538
5376
16297
16128
16900
16128
772

312
76
1872
2184
23712
97
165984
213408
2300064
12)1914(159 — 6
12
160 — 6
71
60
114
108
6

Piece Boat.

312
78
2496
2184 9/
24336
88
6(94688
194688
2141568
10023
8446
1577
(22.060.6 (8446
208.
126
104
× 120
104
166
156
10
96)8446(88
168
766

*[Figures in brackets erased in copy.]

200 *Documents Marked "Whann 1" and "Whann 2."*

Offered by Defendants and Filed June 9, 1908, *nunc pro tunc.*

Boat 10445..... Pit 25618 Bu.

Whann "1."

(On Reverse:) No. 13437. United States Circuit Court, Eastern District of Louisiana. Exhibit — Ordered by defendants — and filed June 9th, 1908, *nunc pro tunc.* H. J. Carter, Clerk.

PITTSBURGH, PA., *Apr.* 30, 1908.

Measured for the Monongahela River Consolidated Coal and Coke Company Craft marked River Coal Check Post Boat No. 10421 Containing 26081 Bushels run of mine coal.

(Signed) FRED. W. THIESS, *Measurer.*

"Whann 2."

201 *Document Marked "Whann 3."*

Offered by Defendants and Filed June 9, 1908, *nunc pro tunc.*

The Monongahela River Consolidated Coal & Coke Co.

River 23′ falling foot of Locks; 7′ 4″ in Canal.
Leaving Louisville, Ky., 10 00 A. M. Apr. 4th, 1907.

Whann 3.

Craft.	Marks.	Number.	Contents.	Pool.	Where loaded. Mine.	Destination.	Consigned to—	Bushels	Remarks.
THO..	R–C	9699	Lump	3	Mongah	4/10 sunk at Stewart	South	23484	
" ..	"	2927	"	4	Eclipse	Natchez	South	23851	
CPN...	"	9221	"	4	Opollo	Grove	Coyle	24289	
CPO...	"	9634	"	4	Crescent	Grove	Coyle (South)	24954	Pit
THO..	"	9584	"	4	"	R. R. Coyle	(South)	25931	"
" ..	"	C–156	"	4	"	4/10 sunk at Stewart	(South)	20163	"
THO..	"	9703	"	4	"	Grove Coyle	Coyle & Co., South	26405	
CPO...	"	9717	R–M	3	Bunola	Willow Grove		25141	
" ..	"	9705	"	3	"	Bayou Sara		25631	
" ..	"	9655	"	3	"	Bayou Sara		26387	
THO..	"	C–125	"	3	Mongah-	Willow Grove		18662	Pit
" ..	"	C–21	"	4	Charloroi	Willow Grove		28853	
" ..	"	2756	"	4	"	"	(South)	22313	
" ..	"	9710	"	4	Pike	"		25784	
" ..	"	9688	"	4	"	"		25577	
CPO...	"	9570	"	4	"	"	(South)	25499	L.R.
THN..	"	9345	"	4	"	"		26531	

Craft.	Marks.	Number.	Contents.	Pool.	Where loaded. Mine.	Destination.	Consigned to—	Remarks.
THO..	"	9567	"	4	Fayette	Wood & Son		24392
" ..	"	9508	"	4	"	" "		25629
" ..	"	9460	"	4	"	" "	(South)	25423
" ..	"	9465	"	4	"	" "		24249
CPO...	"	9600	"	4	"	" "	Vicksburg	25224
THO..	"	9596	"	4	"	Willow Grove		25096 Pit
CPO...	"	9633	"	4	"	" "		25168
" ..	"	B-16	"	4	"	" "		30915 Pit
" ..	"	9716	"	4	"	" "		24510 "
THO..	"	9720	"	4	"	4/10 Sunk at Stewart		25539
" ..	"	9657	"	4	"	Willow Grove		24786
" ..	"	9656	"	4	Champion	"		28206 Pit
" ..	"	9385	"	4	Crescent	"		25774
CPO...	"	9597	"	4	"	Vicksburg		25077
" ..	"	9700	"	4	C "	Willow Grove		25179
THO..	"	2619	Lp.	3	Mongah	Natchez	(South)	22113 From Memphis
202								
Brg...	"	4638	"	Dek.	O. V. C. & M.	From DeKoven		620 Tons
" ..	"	4526	"	"	O.V.C.& M.	" "		620 Tons
Brg....	R C	4703	M. R	"	O.V.C.& M	" "		620 Tons
		7	Cot.					
Mod..		59	Ties	Car.	Steel Co.	Vicksburg, Miss.		
" ..		62	"	"	" "	Memphis,		
Fuel..	R-C	2640	S'lk	3 cars	Mongah	Cairo		8312
Brg....	"	4655	R M	3	Mongah	fuel		17886
" ..	"	4161	"	4	Knob	"		14973
" ..	"	4307	"	4	Eclipse	"		14760
Fuel...	"	2577	S'lk	3	Mongah	"		7672

S. H. H. Clarke, April 4, 1907.
Pilots: Sam Wood & Rob't Boles.
Second trip.

203 *Document Marked "Whann 4."*

Offered by Defendants and Filed June 9, 1908, *nunc pro tunc.*

Steamer Sprague.

The Monongahela River Consolidated Coal and Coke Co.

Whann 4.

Leaving Louisville, Ky., October 28th, 1905.

Craft.	Marks.	Number.	Contents.	Pool.	Where loaded. Mine.	Destination—Consigned to.		Remarks.
THN..	R. C.	8129	Lump	2	Risher		Coal Port	Nov. 17 1905.
THO..	"	2128	Lump	3	Cincinnati		Coal Port	
CPN..	"	8179	"	4	Fayette		Coal Port	
"	"	8344	2 Lump	4	Red stone		Coal Port	
CPO..	"	8261	Lump	4	Eclipse	(South)	Coal Port	
THO..	"	8461	"	4	"	(South)	Coal Port	
"	"	8629	"	4	"		Coal Port	
"	"	8617	"	4	"		Coal Port	
"	"	2772	R-M	2	Rock Run	(South)	Coal Port	
"	"	2959	"	4	Rostraver	(South)	Coal Port	
"	"	2559	"	4	Clipper	(South)	Coal Port	
"	"	3041	"	4	"	(South)	Coal Port	
"	"	2249	"	4	"	(South)	Coal Port	
CPN..	"	8208	"	4	Chamouni		Coal Port	Hurt in Louisville Canal
THO..	"	2953	"	4	Champion	(South)	Coal Port	
"	"	3025	"	4	Vigilant	(South)	Coal Port	
CPC..	"	8498	"	4	Redstone		Bayou Sara, La.	
"	"	8510	"	4	"		Bayou Sara	
"	"	8515	"	4	"		Coal Port	
"	"	8490	"	4	Fayette		Bayou Sara	
"	"	8424	"	4	"	(South)	Coal Port	
THO..	"	2982	"	4	"	(South)	Coal Port	
"	"	2500	"	4	"	(South)	Coal Port	
"	"	8481	"	4	"	(South)	Coal Port	
CPC..	"	8470	"	4	"	(South)	Coal Port	
THO..	"	8305	"	4	"	(South)	Coal Port	
CPC..	"	8411	"	4	"	(South)	Coal Port	
204								
OPC..	R. H.	8242	"	4	Fayette		Coal Port	
"	"	8304	"	4	"	(South)	Coal Port	
CPN..	"	8199	"	4	"		Coal Port	Hurt in Louisville Canal.
THO..	"	2539	"	4	"	(South)	Coal Port	
CPN..	"	8347	"	4	"		Coal Port	
THO..	"	8118	"	4	Crescent		Coal Port	

205 *Document Marked "Whann 5."*

Offered by Defendants and Filed June 9, 1908, *nunc pro tunc.*

Steamer Sprague. Page #2.

The Monongahela River Consolidated Coal & Coke Co.

19 Feet Falling; Captain, Wm. Crowe; Pilot-, Henry Nye & Luke More, Leaving Louisville, Ky., Oct. 28, 1905.

Whann 5.

Craft.	Marks.	Number.	Contents.	Pool.	Where landed, mine.	Destination.	Consigned to.	Remarks.
THO..	R. C.	2873	R-M.	4	Crescent	(South)	Bayou Sara, La.	
" ..	"	8446	Slack	1	Beck's Run		Natchez	11/14/05
" ..	"	8535	"	1	"		Natchez	
" ..	"	8386	"	1	"		Coal Port	
" ..	"	8541	"	1	Ferry		Coal Port	
" ..	"	8295	"	1	"		Natchez	
" ..	"	8692	"	1	"		Natchez	
" ..	"	8444	"	1	"		Natchez	
" ..	"	8538	"	1	"		Coal Port	
" ..	"	8557	"	1	"		Coal Port	
" ..	"	8447	"	1	"		Coal Port	
THN..	"	8275	"	2	Walton		Natchez	
THO..	"	8442	"	4	Eclipse		Coal Port	
Barge..	"	4059	Slack	2	Risher		(Fuel)	
" ..	"	3989	"	2	Risher		(Fuel)	
Fuel ..	"	2592	R. M.	4	Champion		(Fuel)	
" ..	"	2601	"	4	Clipper		(Fuel)	
" ..	"	2562	"	4	"		(Fuel)	
" ..	"	2583	Slack	4	Tremont		(Fuel)	

Sprague October 28 1905.
Pilots, Henry Nye & Luke More.
Fifth trip.

206 Specimen of gauging taken from memorandums of gauging referred to in the testimony of Joseph L. Rock, from page 13 of the tow Joseph B. Williams and page 13 of the tow John A. Wood, and the admission of Counsel with the memorandum of the gauging will be approximately the same as in these two instances.

Offered by Defendants and Filed June 9, 1908, *nunc pro tunc.*

Copy from Pages 13 of 1907 and 1908, Record Book of Tows Gauged During the Years 1907 and 1908, as Referred to in Testimony of J. L. Rock and Exhibited as per Agreement of Council.

Book 1907, page 13, shows that on the 8th day of April, 1907, the following boats were gauged:

Nos. 9406-9091-9448-9095-9348-8961-9115-9490-C. 82-9329-9391-9450-9458-9449-2767-8964-8965-9181-9191-9286-9288-9325-9339-9341. Total, 24 Boats @ 10.00 = $240.00.

Nos. of boats designated:
April 13, '07—9406-9091-9448-9095-9348-8961-9195-9490-C. 82-
April 17/07—#9329.
April 19/07—#9391.
April 20/08—#9450-9458-and 9449.
July 27/07—#2767-9181-9191 and 9286.
Sept 19/07—#9288.

Book 1908, page 13, shows that on the 4th day of April *April* 1908 the following boats were gauged:

Nos. 10192-10398-10411-10413-10216-10278-10218-10403-10379-C. 187-10433-C. 181-10432-10319-10128-10400-10408-10367-10241-9539-10358-10470-10372-10370-10366-10410-10407.

Total 27, boats @ 10.00 = $270.00.

The following were designated:
April 4/08—#10432-10319-10358-and 10366.
April 9/08—#9539.
April 10/08—#10403.
May 6/08—#10407.
May 16/08—#10367.
May 21/08—#10370.

I hereby certify the foregoing to be a correct extract from the records of my office and the original memorandums made at the time of Inspection and Gauging.

Respectfully,

J. LEWIS ROCK,
La. State Coal Gauger.

207 Filed June 9th, *nunc pro tunc.*

United States Circuit Court, Eastern District of Louisiana.

No. —.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE CO.

vs.

LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal and Coke.

Opinion.

The plaintiff seeks an injunction in this case to restrain the coal gaugers from inspecting, and demanding fees for the inspection, of boat or barge loads of coal brought into Louisiana by the plaintiff to be sold by retail.

The plaintiff's contention is that the coal Inspection Act of Louisiana as found in Act 147 of 1888, page 207, and in Act 80 of 1904, page 201, and in Act 137 of the Acts of 1902, page 81, applies only to cases in which the coal has been sold and is to be delivered in boat or barge loads in their entirety, or in some aliquot fraction of a load, as a half, or a fourth, etc.

The defendants contend, on the other hand, that the Inspection statutes apply to all barge loads or boat loads of coal that come down the Mississippi river from Pittsburg, whether these barge loads or boat loads are to be sold in their entirety, or whether the coal in them is to be retailed to numerous individual purchasers.

In determining the meaning of a statute, the principal canon of construction is that by which the purpose of the legislator is determined, and the purpose of the legislator is best determined by ascertaining whether any one will, or will not be, benefitted by a particular construction.

208 To make the Inspection Statute apply to boat loads or barge loads which are not sold in their entirety, but which are to be retailed to numerous purchasers, would protect no one and would accomplish no purpose that I can see. Suppose, for example, Barge No. 1 is brought into the State of Louisiana by the plaintiff company, with the intention of retailing the coal in it to any person who may apply to buy any part of that coal—50 tons may be sold at Baton Rouge, 100 tons at Bayou Sara, 200 tons at Donaldsonville and the remainder at New Orleans. None of these purchasers would receive any possible benefit from the fact that the entire barge load had been inspected when the barge entered the State of Louisiana, and its entire contents there determined. Each purchaser buys a given number of tons of coal and weighs the coal delivered to him to ascertain that he gets the quantity purchased. The weighing by such individual purchaser has no sort of relation to the inspection of the entire barge load.

I think that a reading of the several Acts indicates clearly that the purpose of the lawmaker was to require inspection of all of those barge or boat loads which were sold in their entirety, or where the sale was of some definite fraction of a boat load as, for example, a half, or a fourth, etc.

The title of the Act of 1902, and of the Act of 1904 is "An Act to compel the weighing or gauging in the State of all bituminous or anthracite coal or coke sold in Louisiana by boat, barge or car load." The Act of 1904, Sec. 8, reads, "No boat load of coal or coke, nor any part thereof, shall be delivered to the purchaser" and in the next sentence reads, "And, any person, partnership, firm or corporation who shall sell or deliver in this State a boat load or a barge load of coal or coke, or any part thereof". Construing the word part with reference to the object of the statute and with reference to the words that immediately precede it, I do not see how there can be any

209 doubt that the part meant, is an aliquot fraction of a load.

The gauge Inspection Statute of Louisiana was sustained as a constitutional act of legislation by Louisiana, in the case of the Pittsburg & Southern Coal Co. *vs.* Louisiana, 156, U. S. page 590. But in that case it appears that the statute was enforced as against a dealer "who sold to dealers, planters, and other purchasers, but in no quantity less than a boat or barge load". The extent of the decision of the Supreme Court, therefore, is to sustain this statute insofar as it applies to the sale of boat or barge loads of coal. No case has been cited in which it has been held that the statute applies to those boat

loads or barge loads of coal, brought down the river, which are not sold in Louisiana by the boat load or barge load but are retailed to numerous purchasers.

I think, therefore, that the plaintiff is entitled to an injunction restraining the coal inspectors from inspecting those barges the coal in which is not sold by the boat load or barge load or by some aliquot fraction of a boat load or barge load; but which is retailed to numerous individual purchasers in varying quantities. To that extent the plaintiff is entitled to a decree.

The decree herein, however, will not enjoin the defendants from inspecting all boat or barge loads of coal brought into the State of Louisiana by the complainant, or by any one else, but will merely enjoin the collection of the inspection fees, pending an appeal in this case. The defendants shall still have the right to inspect all boat loads or barge loads of coal as they are brought into this State, and should the decree in this case be reversed such inspection shall determine conclusively the amount that the defendants shall be entitled to recover for their inspection fees if the upper court holds that the defendants are entitled to recover.

210 *Decree.*

Entered and Filed June 11th, 1908.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY

vs.

LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal and Coke.

This cause came on to be heard at this term for final hearing upon the Bill of Complain*ant*, the answer of defendants, the replication, exhibits, proofs and testimony as per the notes of evidence on file, and was argued by the counsel for the parties respectively, to-wit: Charles S. Rice, Esq., Solicitor for Complainant; E. H. McCaleb, Esq., Solicitor for the Defendants, and was submitted to the Court:

Whereupon and upon consideration of the testimony, the exhibits and proofs, and for the reasons assigned in the written opinion of the Court on file, the Court finds that the equity in this case is with the complainant, as against the defendants, the said Louis Knop and Joseph L. Rock, individually and as state gaugers of coal and coke, and that the said Complainant, the Monongahela River Consolidated Coal & Coke Company, is entitled to the relief which it prays against them. It is therefore ordered, adjudged and decreed that the defendants and each of them, personally and as state gaugers of coal and coke, and their successors as such gaugers of coal and coke, if such there be and any and all of them are hereby enjoined from demanding, collecting or attempting to collect in any manner from the complainant or any of the agents of said complainant any moneys for services or as fees for gauging any of the coal

of the complainant whether contained in any coal boat, barge or other receptacle or package save and except such as is sold or intended to be sold by coal boat loads or by barge loads, to be designated by the complainant.

The decree herein, however, will not enjoin the defendants from inspecting, if they so desire, all boat or barge loads of coal
211 brought into the State of Louisiana by the complainant, or by any one else, but will merely enjoin the collection of the inspection fees, pending an appeal in this case. The defendants shall still have the right to inspect as they claim the Statute authorizes and requires them to do, all boat loads or barge loads of coal as they are brought into this State, and should the decree in this case be reversed such inspection shall determine conclusively the amount that the defendants shall be entitled to recover for their inspection fees if the upper court holds that the defendants are entitled to recover.

It is further ordered, adjudged and decreed that the said defendants be condemned to pay all the costs of this suit.

June 11/1908.

(Signed) EUGENE D. SAUNDERS, *Judge.*

212 *Petition and Order for Appeal. Filed June 13th,* 1908.

United States Circuit Court Fifth Circuit, Eastern District of Louisiana, New Orleans Division.

No. 13437.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY
versus
LOUIS KNOP and JOSEPH L. ROCK, Individually and as Gaugers of Coal and Coke.

To the Honorable the United States Circuit Court for the Eastern District of Louisiana:

The petition of Louis Knop and Joseph L. Rock, Individually and as Gaugers of Coal and Coke, respectfully represent:

That said defendants are aggrieved by the decree of this Honorable Court herein rendered and signed on the 11th day of June, 1908; that there is error to the prejudice of the defendants, in said decree, by which they and each of them will be irreparably injured.

Wherefore petitioners prays, that they be allowed an appeal from said decree, returnable to the Supreme Court of the United States, according to law, upon giving bond to be fixed by the Court, and that the plaintiff, the Monongahela River Consolidated coal and Coke Company, be cited to answer said appeal; and petitioners pray for general and equitable relief.

(Signed) WALTER GUION,
Att'y Gen'l of Louisiana, Solicitor for Defendants.
(Signed) E. H. McCALEB, JR.,
Of Counsel.

Order.

Let an appeal be granted petitioners as prayed for, returnable to the Supreme Court of the United States, at the city of Washington, within thirty days, upon petitioners giving bond, with good and sufficient security in the sum of Two Hundred Dollars, conditioned as the law directs.

New Orleans, June 13th, 1908.

(Signed) EUGENE D. SAUNDERS, *Judge.*

213 *Assignment of Errors. Filed June 13th,* 1908.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana, New Orleans Division.

No. 13347.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY

versus

LOUIS KNOP and JOSEPH ROCK, Individually and as Gaugers of Coal and Coke.

Assignment of Errors.

Comes now Louis Knop and J. L. Rock, individually and as State Gaugers of coal and coke, by *this* Counsel, and respectfully represent that they feel aggrieved by the proceedings and judgment and decree of the Court in the above entitled and numbered, cause, and assign error thereto as follows:

1st. The Court erred in holding that Act 147 of 1888 and Act 80 of 1904 of the General Assembly of Louisiana do not apply to the inspection and gauging of all boats and barges or parts thereof, containing anthracite or bituminous coal, brought into the State for sale, or for delivery under sales made out of the State.

2nd. The Court erred in holding that such inspection and gauging, as required by said Statutes, is not compulsory and is not necessary in case said boats or barges of coal and coke, or parts thereof, are intended to be subsequently sold, or are subsequently sold by barrel or box measure or by weight.

3rd. The Court erred in holding that under Act 147 of 1888 and Act 80 of 1904, the right or duty of respondents in gauging and inspecting, is to be determined, not by the law, but by the in-

214 struction of the Complainants, and that such right, power or or duty under the law becomes subordinated to the will, direction, intention and convenience of the Complainant.

4th. The Court erred in holding that under said Act 147 of 1888 and 80 of 1904, the power of inspection and gauging of coal in boats and barges, or any part thereof, is limited and restricted according to and depending upon the terms and conditions of sale and mode of delivery prescribed by the vendor and vendee.

5th. The Court erred in holding that only such boats and barges of coal or parts thereof, shall be gauged and the inspection fee paid when such boats and barges of coal shall be designated by the vendor.

6th. The Court erred in holding that under Section 3, of Act 80 of 1904, no penalty accrues for failure or refusal of Complainant to notify respondents within twenty-four hours after the arrival in this State of any boat or barge loaded with coal or coke of such arrival, and requesting that said boat or barge loaded with coal or coke be gauged, save and except such as is sold or intended to be sold by coal boat or barge load to be designated by the Complainant.

7th. The court erred in failing and refusing to hold that to prevent fraud and imposition said inspection laws provide against the possibility and probability of evasion of their provisions, and accordingly the Court erred in its construction of said laws and by the decree which (under the right granted to Complainant to designate what coal boats or barges shall not be gauged) places it within the power of Complainant to evade inspection and gauging of said coal boats and barges or parts thereof, after their arrival in the State.

215 8th. The court erred in failing and refusing to hold that Acts 137 of 1894 and 58 of 1902, were not repealed by Act 80 of 1904, and in failing and refusing to hold that Acts 147 of 1888, 137 of 1894, 58 of 1902, 80 of 1904 were and are not in violation of Art. 29 of the Constitution of the State of Louisiana of 1898, or Article 1 of that instrument; and in failing and refusing to hold that said inspection laws above mentioned are not in violation of Article 1, Section 3, Clause 3 of the Constitution of the United States, and in refusing and failing to hold that said laws are inspection laws, that all and each of said laws are not invalid or oppressive, nor do they deprive Complainant of its property without due process of law, nor of the equal protection of the law, as contemplated by the Fourteenth Amendment of the Constitution of the United States.

9th. The court erred in failing or refusing to hold that said above mentioned laws were passed as an incident to the police power of the State and were designed and had for their object to protect the community from frauds and imposition, as well as to protect the said Complainant and its agents in the transactions had between them relative to the sale, disposition and delivery of the coal consigned and shipped to said agents in Louisiana; and to aid in the detection of crime and fraud the State's police power in that regard should not be surrendered to the Complainant and subordinated to its will by the decree herein, by authorizing such Complainant to direct when, where and under what circumstances and conditions dictated by it, the coal boats and barges, or parts thereof, shall be gauged by the respondents.

10th. The Court erred in failing and refusing to hold that as there is no contest as to the reasonableness of the inspection fees, the case presents no judicial question, and the Court was without
216 jurisdiction to regulate or prescribe the manner of the exercise of the respondent's duties.

Wherefore, the said Louis Knop and J. L. Rock, individually and as State Gaugers of coal and coke, respondents, pray the Honorable Court to examine and correct the errors assigned and for a reversal of the judgment and decree of the Honorable The Circuit Court of the United States for the Eastern District of Louisiana, entered in the above entitled cause.

(Signed) WALTER GUION,
Attorney General of Louisiana, Solicitor for Defendants.
(Signed) E. H. McCALEB, JR.,
Of Counsel.

217 *Bond for Appeal. Filed June 13th,* 1908.

Know all men by these presents, That we Louis Knop and Joseph Lewis Rock individually and as Gaugers of Coal & Coke of the State of Louisiana as principal, and Alexander J. Darrienx, as surety are held and firmly bound unto the Monongahela River Consolidated Coal & Coke Company in the full and just sum of Two hundred ($200.00) Dollars to be paid to the said Monongahela River Consolidated Coal and Coke Company — certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of June in the year of our Lord, one thousand nine hundred and eight.

Whereas, lately at a Session of the United States Circuit Court, Fifth Judicial Circuit, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court between The Monongahela River Consolidated Coal and Coke Company and Louis Knop and Joseph Lewis Rock individually and as gaugers of coal and coke in and for the State of Louisiana, No. 13437 of the docket thereof, a final decree was rendered on June 11th 1908 against said Louis Knop and Joseph L. Rock, individually and as gaugers of coal and coke in and for the State of Louisiana, and the said Louis Knop and Joseph Lewis Rock individually and as gaugers of Coal and coke in and for the State of Louisiana having obtained an order of appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the final decree in the aforesaid suit and a citation directed to the said Monongahela River Consolidated Coal and Coke Company, citing and admonishing it to be and appear before the Supreme Court of the United States to be holden at the city of Washington, within 30 days from date thereof.

Now the condition of the above obligation is such, That if the said Louis Knop and Joseph Lewis Rock individually and as
218 gaugers of coal and coke in and for the State of Louisiana shall prosecute their appeal to effect, and answer all damages

and costs, if they fail to make their plea good, then the above, obligation to be void; else to remain in full force and virtue.

(Signed) LOUIS KNOP. [SEAL.]
" J. LEWIS ROCK. [SEAL.]
ALEX J. DAIRIEUX. [SEAL.]

Sealed and delivered in presence of
E. H. McCALEB, JR.
E. HOWARD McCALEB.

Approved by—
EUGENE D. SAUNDERS, *Judge*.

219 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Henry J. Carter, Clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, Do Hereby Certify, That the foregoing 218 pages contain and form a full, complete, true and perfect transcript of the Record and Proceedings had, together with all the evidence adduced on the trial of the case of The Monongahela River Consolidated Coal and Coke Company *vs.* Louis Knop and Joseph L. Rock, Individually and as Gaugers of Coal and Coke No. 13437 of the Docket of the said Court, together with the Assignment of Errors in said cause.

Witness my hand and the seal of said Court, at the City of New Orleans, this 27 day of June A. D., 1908.

[Seal Circuit Court for the 5th Circuit & Eastern District of La.]

H. J. CARTER, *Clerk*.

I, Eugene D. Saunders, United States Judge for the Eastern District of Louisiana, do certify, that Henry J. Carter, whose name is signed to the above certificate as Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now the Clerk of said Court: That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such Clerk.

Given under my hand, at the City of New Orleans, in said district this 27th day of June A. D., 1908.

EUGENE D. SAUNDERS, *Judge*.

220 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the Monongahela River Consolidated Coal and Coke Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of

Washington, D. C., within 30 days from date hereof, pursuant to an Appeal filed in the Clerk's Office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, wherein Louis Knop and Joseph L. Rock, Individually and as Gaugers of Coal and Coke, are Appellants, and the Monongahela River Consolidated Coal and Coke Company is Appellee, to show cause, if any there be, why the judgment rendered against the said Louis Knop and Joseph L. Rock, individually and as Guagers of Coal and Coke as in said Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 13 day of June in the year of our Lord one thousand nine hundred and eight.

EUGENE D. SAUNDERS, *Judge.*

221 [Endorsed:] 4 E. Return. United States Circuit Court, Eastern District of Louisiana. No. 13437. Monongahela River Consolidated Coal and Coke Company *vs.* Louis Knop and Joseph L. Rock, individually and as Gaugers of Coal and Coke. Citation of Appeal. Marshal's Return. No. —. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed Jun- 13, 1908. E. M. Fuller D'y Clerk.

Before the undersigned authority this day personally came and appeared B. F. Queen, Deputy U. S. Marshal for the Eastern District of Louisiana, personally known to me as such, who being duly sworn deposes and says that on the 13th day of June, 1908 he, affiant served this writ on the Monongahela River Consolidated Coal and Coke Company by handing the same to Mr. Charles S. Rice of the law firm of Rice and Montgomery, attorneys of record for the Monongahela River Consolidated Coal and Coke Company, in person, in the City of New Orleans, Louisiana.

B. F. QUEEN,
Deputy U. S. Marshal.

Sworn to and subscribed before me on this 13th day of June, 1908.

[Seal Henry J. Carter, United States Commissioner, Eastern District of Louisiana.]

H. J. CARTER,
U. S. Commissioner.

Endorsed on cover: File No. 21,245. E. Louisiana, C. C. U. S. Term No. 449. Louis Knop and Joseph L. Rock, individually and as gaugers of coal and coke, appellants, *vs.* The Monongahela River Consolidated Coal and Coke Company. Filed June 30, 1908. File No. 21,245.

Supreme Court of the United States.

October Term, 1908.

No. 449.

LOUIS KNOP AND JOSEPH L. ROCK, INDIVIDUALLY AND AS GAUGERS OF COAL AND COKE, *Appellants.*

VERSUS

THE MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY.

Come Appellants and move the Honorable Court to advance this cause upon the docket and hear it, at as early day as the convenience of the Court will permit, and for the reasons therefor movers state:

That on December 10th, 1906, the Monongahela River Consolidated Coal and Coke Company, brought its Bill in Equity before the United States Circuit Court for the Eastern District of Louisiana against Louis Knop and Joseph L. Rock, State Coal Gaugers, Appellants, seeking to enjoin them from inspecting and gauging those coal boats

and barges brought into the State, which are sold or intended to be sold in broken packages, that is to say, by weight or in less quantities than a boat or barge load to various purchasers. Among other things, it was claimed that the Louisiana Acts No. 80, approved July 1st, 1904; No. 147, approved July 12th, 1888; No. 137, approved July 12th, 1894, and No. 58, approved June 26th, 1902, had been repealed, and if not repealed, that these laws were in conflict with the State Constitution, Article 1 of the Bill of Rights and both the Commerce clause and Fourteenth Amendment of the Federal Constitution, in so far as the right of inspection and the collection of any monies for services or as fees for gauging coal, contained in any coal boat, barge or any other receptacle, or package, save for and except such as is sold or intended to be sold by coal boat or barge load to be designated by the Complainant.

A preliminary injunction was asked for but was disallowed, provided defendants would furnish bond in the sum of $5,000, conditioned to re-imburse the Complainant.

> "any and all such sum or sums, with legal interest thereon from respective dates of payment thereof, as shall have been paid to them as fees as gaugers of coal and coke, by said Complainant, from and after the filing of this cause, in case it shall be determined, upon final decree herein, that plaintiff is entitled to relief prayed for in the said bill of complaint." (R. p. 17, 18).

In compliance with this order, the bond was furnished (R. p. 110, 116) and the fees turned over to the surety for his better protection (R. p. 116). Pending the course of proceedings in the Court below, the Complainant paid $5,000 to the surety for fees which had accrued up to said

sum, but nothing has been paid for fees which have accrued subsequently and amounting to $2,100 additional on March 24th, 1908, or for fees accruing since that time. (R. p. 116). After answer, replication and hearing, a final decree was entered, and appeal taken therefrom and duly lodged in this Court. The decree enjoined the defendants (Appellants here):

> "from demanding, collecting or attempting to collect in any manner from the Complainant or any of the agents of said Complainant any moneys for services or as fees for gauging any of the coal of the Complainant whether contained in any coal boat, barge or other receptacle or package save and except such as is sold or intended to be sold by coal boat loads, or by barge loads, to be designated by the Complainant.
>
> "The decree herein, however, will not enjoin the defendants from inspecting, if they so desire, all boat or barge loads of coal brought into the State of Louisiana by the complainant, or by any one else, but will merely enjoin the collection of the inspection fees, pending an appeal in this case. The defendants shall still have the right to inspect as they claim the Statute authorizes and requires them to do, all boat loads or barge loads of coal as they are brought into this State, and should the decree in this case be reversed, such inspection shall determine conclusively the amount that the defendants shall be entitled to recover for their inspection fees if the upper court holds that the defendants are entitled to recover." (R. pp. 126, 127).

Now movers show that although said decree does not enjoin inspection and gauging of said coal boat and barges to be designated by the Monongahela Company, until the disposition of the appeal in this cause, yet movers are enjoined from collecting the fees for their services. That the

compensation for gauging the few boats of coal, which Complainant has designated, or will designate, does not and would not pay for such gauging, thereby compelling movers to carry on the operations of their office at a loss, (R. p. 114) it also appearing that 90% of gauging of all coal boats and barges in Louisiana was and is for account of the Monongahela Company (R. p. 102), and that said defendant has practically absorbed the coal boat business heretofore carried on in Louisiana (R. p. 90).

And so it is, may it please your Honors, that by the decree herein, restraining movers from collecting their fees whilst permitting inspection without payment, which inspection your movers are bound to make under the provisions of the foregoing laws and under their oath of office, they have been hampered, and will continue to be hampered in the exercise of their duties in gauging said boats and barges until the final disposition of this cause. Twenty-two months have elapsed since the preliminary conditional order for injunction was issued and, unless this appeal is advanced for hearing, heard and decided, at this term, more than two years shall have passed.

The issues herein involve questions of great itnerest and pressing importance to the public, and the operation of the government of Louisiana, under its police powers, will be embarrassed by delay so long as they remain undetermined by the Court, since it will be practically impossible for the State of Louisiana to enforce the gauging of all coal boats, coke boats, and barges, under her inspection laws unless the State gaugers are compensated for their inspection and gauging.

Movers finally show that the merits of this controversy have once been adjudicated by this Court in Pittsburg and

Southern Coal Company vs. Louisiana, 156 U. S. 590 wherein the constitutional questions set up in the Bill of Complaint herein have been disposed of and decided adversely to Complainant's claim. That the pretended right in Complainant to order the gauging of such coal boat and barges according to its designation and direction is an afterthought, not only because such contention has been covered by the opinion and decree in the above cited case, but because ever since its organization in 1899 (R. p. 31), the Monongahela Company has acquiesced in the gauging above referred to irrespective of broken or unbroken packages, in accordance with the above mentioned laws; and further that where a question has once been decided by this Court between parties in the same situation, it cannot be reopened after adjudication.

Wherefore, for an additional reason, this cause should be advanced under rule 26, paragraph 4, which provides:

> "Cases once adjudicated by this Court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of court on motion of either party."

Respectfully submitted,

Walter Guion

Attorney General of Louisiana.

E. Howell Clarke Jr

Of Counsel for Appellants.

To Messrs. Rice & Montgomery and Chas. S. Rice, Attorneys for Appellee in the above entitled cause:

You are hereby notified that the Appellants in the above named cause will, on the 12th day of October 1908, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as Counsel can be heard, submit for the consideration of the Court the foregoing motion.

Attorney General.

Of Counsel for Appellants.

E. H. McCaleb, Jr., being duly sworn deposes and says: That on the 5th day of October, 1908, he served copies of the foregoing motion to advance upon Messrs. Rice & Montgomery and Chas. S. Rice, Attorneys for the Monongahela River Consolidated Coal & Coke Co., by delivering the same to Chas. S. Rice Esq. its Counsel, in the Morris Building, in the City of New Orleans.

Sworn to and subscribed before me this 5th day of October A. D. 1908

Notary Public

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 449.

LOUIS KNOP AND JOSEPH L. ROCK, INDIVIDUALLY AND AS COAL GAUGERS OF COAL AND COKE, APPELLANTS,

versus

THE MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY.

STATEMENT OF THE CASE.

As the issue here is intimately connected with the opinion and decision of this Court in Pittsburg and Southern Coal Co. vs. State, 156 U. S. 590, Act No. 147 of the Louisiana Assembly of 1888, may be thus stated in the language of Mr. Justice Field:

> "In 1888 the Legislature of Louisiana passed an act for the appointment of two coal and coke boat gaugers, to fix their compensation, and confine their duties. It provided that they should be appointed by the Governor of the State, with the approval and consent of the Senate, to hold their offices in the City of New Orleans, with the proviso that the Governor should have the power to remove any one of them upon sat-

isfactory proof to him of negligence and official misconduct. The act further provided that each of the gaugers should give a bond payable to the Governor, or his successor in office, with two sufficient sureties, in the penal sum of five thousand dollars, conditioned for the faithful performance of his duties. The act declared that it should be the duty of the gaugers when called upon for that purpose, to gauge any coal or coke boat or barge in the port of New Orleans, or the State of Louisiana; that such gauging should consist in reducing the length, breadth and depth, inside measurement, of boats or barges, deducting all obstructions and displacements, into cubic inches and dividing the cubic inches by twenty-six hundred and eighty-eight, thus ascertaining the net measurement in bushels; and that two bushels and six tenths of a bushel should constitute a barrel; that in all cases it should be the duty of the gaugers, or either of them, to respond promptly to any call made for their or either of their services, and to furnish a full and detailed certificate of the gross measurement of the boat or barge gauged and the allowance for obstructions or displacements; that the fee for gauging or regauging should be ten dollars for each boat, and five dollars for each barge, to be paid by the seller, except as subsequently provided; that the purchaser of any boat or barge of coal or coke should have the privilege of calling upon the said gauger or gaugers to regauge boats or barges, in all cases where the original gauge was not satisfactory, and such regauge should be adopted as the correct measure; that if the original gauge should be found to be correct, then the purchaser should pay the fee for re-gauging; but if the re-gauge should show a less measure, then the seller should pay the fee.

"The law also declared that no boatload of coal or coke should be sold in the city or State until it

had been inspected, as provided for in the act, and that any person who should sell a boatload of coal or coke that had not been gauged as required should be liable to a penalty of fifty dollars for each boat or barge thus sold, to be recovered, with costs of suit, in any court of competent jurisdiction, for the benefit of the Charity Hospital of New Orleans."

The constitutionality and validity of this act was questioned in the State Courts almost immediately after its passage. It was there contended "that if the act can be construed as meaning that the employment of the State gaugers is compulsory, the legislation is violative of Articles 1, 6, 29 and 46 of the Constitution of the State of Louisiana (of 1879) and of the first and second clauses of Section 10 of Article 1 of the Fifth Amendment; of Section 1 of the Fourteenth Amendment and of the third clause of Section 8 of Article 1 of the Constitution of the United States (State vs. Coal Co., 41 La. An. 465, 467)."

From a perusal of the last cited case, the Supreme Court of Louisiana dismissed all these objections and sustained the statute, whereupon a writ of error was sued out from this Court. In Pittsburg & Southern Coal Co. vs. State of La., supra, the judgment of the Louisiana Supreme Court was affirmed. It was accordingly held that Act 147 of 1888, did not interfere with the power vested in Congress over commerce, nor did it lay any impost or duty on imports or exports from other States, nor was there any discrimination between the transportation of coal and coke from States other than Pennsylvania "as in any respect impairs the efficiency of the law of Louisiana," but that the statute was proper in the exercise of the State's police power. (156 U. S. 590, 601).

By Act No. 137, approved July 12th, 1894, the weighing

or gauging of coal or coke sold in Louisiana by boat, barge or carload was made compulsory and the fees, duties and responsibilities of the Coal Gaugers remained as then fixed by law, that it to say, according to Act No. 147, of 1888, provided that the fee for weighing shall not exceed one cent per ton; a barrel containing 6,988 cubic inches and a ton of 2,000 pounds were fixed as the standard measures for the sale of bituminous and anthracite coal. (R. p. 85). Because of some clerical error or omission in Section 1 of the foregoing statute, that section was amended by Act No. 47, approved June 26th, 1902 (R. p. 86).

On July 1st, 1904, the General Assembly passed Act No. 80, entitled "An Act to amend and re-enact Sections 3, 5 and 8 of Act 147, approved July 12th, 1888." By this last statute, it was made the duty of the State Gaugers to gauge all boats and barges containing coal and coke brought into the State for sale or for delivery under sales made out of the State. They were also required to respond promptly to any call made for their or either of their services, and to furnish a full and detailed certificate of the gross measurement of the boat or barge gauged, together with the allowance made for obstructions and displacements. It was further provided that:

> "No boatload of coal or coke, nor any part thereof, shall be delivered to the purchaser, whether the sale thereof was made within or without the State, until it has been inspected as provided for in this Act. And, any person, partnership, firm or corporation who shall sell or deliver in this State a boatload or a bargeload of coal or coke, or any part thereof, that has not been gauged as herein provided, or who, within twenty-four (24) hours after the arrival in

this State of any boat or barge loaded with coal or coke, shall not have notified said coal gaugers, or either of them, at their offices in the City of New Orleans, of its arrival in this State, requesting that the same be gauged as aforesaid, shall be liable to a penalty of fifty dollars ($50) for each boat or barge of coal or coke, or part thereof, so sold or delivered, and for each boat or barge so arriving in this State of which no notice was given to the said coal gaugers, to be recovered with costs of suit, in any court of competent jurisdiction for the benefit of the Charity Hospital of the City of New Orleans."

On December 10th, 1906, the Monongahela River Consolidated Coal and Coke Company, a Pennsylvania corporation, brought its Bill in Equity before the United States Circuit Court for the Eastern District of Louisiana against Louis Knop and Joseph L. Rock, State Coal Gaugers, Appellants, seeking to enjoin them from inspecting and gauging those coal boats and barges brought into the State, which are sold or intended to be sold in broken packages, that is to say, by weight or in less quantities than a boat or barge load to various purchasers (R., p. 1 to 9). Among other things, it was claimed that Act 137 of 1894, and 58 of 1902, had been repealed, and if not repealed, that the Louisiana Acts No. 80, approved July 1st, 1904; No. 147, approved July 12th, 1888; No. 137, approved July 12th, 1894, and No. 58, approved June 26th, 1902, were in conflict with the Article 1 of the Bill of Rights of the 1879 and 1898 Constitutions, and Articles 29 and 31 of the 1879 Constitution and 1898 Constitution, respectively, and both the Commerce clause and Fourteenth Amendment of the Federal Constitution (R. p. 5), in so far as the right of inspection and the collection of

any monies for services or as fees for gauging coal, contained in any coal boat, barge or any other receptacle, or package, save for and except such as is sold or intended to be sold by coal boat or barge load to be designated by the Complainant.

A preliminary injunction was asked for but was disallowed, provided defendants would furnish bond in the sum of $5,000, conditioned to re-imburse the Complainant,

> "any and all sum or sums, with legal interest thereon from respective dates of payment thereof, as shall have been paid to them as fees as gaugers of coal and coke, by said Complainant, from and after the filing of this cause, in case it shall be determined, upon final decree herein, that plaintiff is entitled to relief prayed for in the said bill of complaint." (R. p. 17, 18).

In compliance with this order, the bond was furnished (R. p. 110, 116) and the fees turned over to the surety for his better protection (R. p. 116). Pending the course of proceedings in the Court below, the Complainant paid $5,000 to the surety for fees which had accrued up to said sum, but nothing has been paid for fees which have accrued subsequently and amounting to $2,100 additional on March 24th, 1908, or for fees accruing since that time. (R. p. 116). After answer, replication and hearing, a final decree was entered, an appeal taken therefrom and duly lodged in this Court. The decree enjoined the defendants (Appellants here):

> "from demanding, collecting or attempting to collect in any manner from the Complainant or any of the agents of said Complainant any moneys for services or as fees for gauging any of the coal of the Complainant whether contained in any coal boat, barge

or other receptacle or package save and except such as is sold or intended to be sold by coal boat loads, or by barge loads, to be designated by the Complainant.

"The decree herein, however, will not enjoin the defendants from inspecting, if they so desire, all boat or barge loads of coal brought into the State of Louisiana by the complainant, or by any one else, but will merely enjoin the collection of the inspection fees, pending an appeal in this case. The defendants shall still have the right to inspect as they claim the Statute authorizes and requires them to do, all boat loads or barge loads of coal as they are brought into this State, and should the decree in this case be reversed, such inspection shall determine conclusively the amount that the defendants shall be entitled to recover for their inspection fees if the upper court holds that the defendants are entitled to recover." (R. pp. 126, 127).

Approaching a consideration of the evidence, it appears that the Complainant, Appellee, is chiefly engaged in operating coal mines and producing coal on the Monongahela River in the State of Pennsylvania, in addition to which it operates a mine on the Illinois Central Railroad at DeKoven, in the State of Kentucky. The product from these mines is disposed of partially by shipping by rail and partially by river. Incident to marketing the Company's product, it also operates a large number of steamboats, tugs, coal boats and coal barges. (R. p. 31). Practically all, or at least 90% of the coal boat and barge trade carried on in the State of Louisiana is controlled and monopolized by the Complainant Company (R. p. 47, 59, 102).

At each of the Company's mines, the coal mined is weighed by two weigh-masters, one representing the Com-

pany, the other representing the miners. (R. p. 78). The weight or pit measure of the coal so mined is reduced to bushels, 26 1-3 bushels of coal and 50 bushels of coke making each a ton of 2000 pounds. (R. p. 35). A certificate is issued by the weigh-masters and is turned over by them to the Company, upon which settlement is made with the miners. (R. p. 78, 79). (See specimen certificate marked Whann 1, R. p. 120). From the coal tipple the coal is loaded on the Company's coal boat or barge. A measurer or gauger employed by the Company goes about from boat to boat and ascertains the cubical contents in bushels of each boat or barge of coal. (R. p. 80). He issues his certificate of the gauge, showing how many bushels of coal each boat contains and delivers it to the Company, a specimen of which may be found in Record, p. 120. The coal boats and barges thus separately gauged are then gathered together in a tow, the number of bushels in each boat or barge as shown by the gauge certificate of the Company's measurer appearing on the manifests of the tow. (See document marked Whann 3, Whann 4, R. p. 120, 121). The boats are then towed down the Ohio and Mississippi Rivers to their destination for delivery to the consignee; in this case to W. G. Wilmot & Company, the Louisiana Managers of the Monongahela Company (R. p. 60, 73) and taken in charge by R. J. Whann, the Company's stock keeper for the State of Louisiana. (R. p. 60). When they reach the Louisiana State line, in accordance with the laws above referred to, the Company's agents notify the State Coal Gaugers, Appellant, of the arrival of the tow, (R. p. 102, 103), whereupon the State Coal Gaugers proceed to gauge the contents of each coal boat and barge of the entire fleet as required by law.

(R. p. 51,66.) A certificate for each full coal boat or barge is prepared by the State Coal Gaugers, which is turned over by them to the Company's Agent. On this certificate the Agent pays the State Coal Gaugers their inspection or gauging fees on a basis of $10 for each coal boat and $5.00 for each coal barge.

Before the institution of this suit, these certificates were delivered to the agents and settlements made "without objection on the part of the Complainant and with the consent and acquiescence of the Complainant in said gauging in accordance with the Statutes of the State of Louisiana." (R. p. 35, 65, 67). Since then the Company, through its agents, would designate which coal boats or barges they desired gauging as the tow would cross the State line and they would settle with the State Coal Gaugers on these designations. (R. p. 67, 68, 69). For those coal boats and barges not designated, payments for fees have been made to the surety of the Appellants up to the sum of $5,000 agreeably to the order of Court (R. p. 17) as above stated, there still remaining an additional balance of $2,100.00 and more which has been withheld for fees for gauging boats not designated, in case the decree herein is reversed (R. p. 103, 110, Document marked Defendant 1, R. p. 115, 116, R. p. 65, 126, 127).

That there exists a relation between weight and gauge indubitably appears from the testimony. (R. p. 35, 50, 66, 91, 92, 100).

Thus:

> "The weight of a barrel of coal as it is understood and regarded in the New Orleans market varies from 180 to 200 lbs., 180 lbs. being applied exclusively to domestic coal for family use, being what is known as

forked lump; from 190 to 200 lbs. is recognized as a barrel of mine run coal or slack coal. The weight of a bushel of coal is 76 lbs. It takes about 26 1-3 bushels of coal to make a ton of 2000 lbs. It takes about 50 bushels of coke to make a ton of 2000 lbs."

(R. p. 35, 49, 66, 76, 77, 91, 94, 95, 100).

The pit measure or weight taken at the mine (specimen of which is found on R. p. 120) accomplishes the purpose of checking the correctness of the Company's gauge after the coal has been loaded into the coal boat, in addition to serving as a basis of settlement with the miners. The Pittsburg or Company's gauge (R. p. 120) is made according to the Louisiana law (Act 147 of 1888, R. p. 61). It has a two-fold purpose: first, to check the correctness of the Louisiana State Gauge (R. p. 54, 61, 64, 94) and second, to check the Company's stock of coal in the hands of its several agents, thereby facilitating it in finding out how the stock stands, whether short or not, and in making settlements between the agents and the Company (R. p. 92, 94, 50, 52, 53, 54, 62, 64, 66). The Louisiana State Gauge serves the same purpose as the Pittsburg gauge in all dealings between the Company and its agents and thereby protects them and each of them from any frauds or impositions in their relaiton with each other and with their customers. It is likewise a protection to the purchaser of coal whether by full boat loads, by parts of boat loads or by weight. (R. p. 93, 100).

The Complainant, Appellee, and its witnesses contend and testify that the compulsory gauging of boat or barge loads of coal is unnecessary in cases where the coal contained in these boats or barges are intended for sale either by weight, bushel, barrel, or in less quantities than a full

boat load. They, however, admit the necessity of gauging as a protection to the purchaser where the boat load is sold in its entirety, that is to say, in an unbroken package, but deny any benefit accrues to anybody in all other cases, or in what they please to term broken packages. Mr. Theiss, the Company's President, testifies: "By broken packages, we mean the coal which is sold from a barge or coal boat which is not sold by the Louisiana State Gauge, and by unbroken packages is meant, boats or barges which are sold and settled for by the Louisiana State Gauge." (R. p. 34).

On the other hand, defendants and their witnesses contend and testify, that the gauges and State Gaugers Certificates are necessary, mainly, for the protection of the purchaser whether under sales made in broken or unbroken packages and for the protection of the Company and its agents in their dealings with each other relative to the handling of the coal, and that the omission of gauging would open the door to frauds and impositions in the sale and delivery of all coal, the possibilities of disposing full coal boat loads without having been gauged or without a State Gauger's Certificate and the inconveniences, embarrassment, confusion, delays and useless expense to all parties, (State Gaugers, seller and purchaser), arising from a failure to gauge each full boat load of coal within twenty-four hours after arrival of the coal boats in the State, as required by Sections 2 and 3 of Act No. 80 of 1904. (R. p. 87, 91, 92, 93, 94, 96, 99, 100, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112).

First, as to the inconvenience, embarrassment, delays, confusion and useless expense entailed by a failure to guage all full boats of coal within 24 hours after their arrival in the State. "It is a fact that each and every boat

or barge containing coal or coke shipped by the Complainant comes into the State of Louisiana in full boat or barge loads where said coal or coke is subsequently delivered by said coal or coke boat loads in whole or in part to purchasers for consumption and resale in Louisiana." (R. p. 34, 35, 66). At the State line the State Gaugers board these coal boats and barges and they gauge or measure each boat or barge contained in the fleet or tow. The system of gauging is to get the cubical contents of each boat in cubical inches, deducting timber voids. They divide that by 2688, which means cubical inches to the bushel, then divide the remainder by 2.6 bushels to the barrel. (R. p. 108). They then issue their certificate for each boat or barge, showing the number of bushels and barrels of coal in each boat or barge. (See specimen Certificate, R. p. 117). This certificate is delivered to the Company's Agent, Mr. Whann. It serves for all subsequent requirements, unless in case of error or an unsatisfactory gauge, a regauge of the boat is ordered. (R. p. 111).

After entering the State, the fleet or tow breaks up, the coal boats or barges being distributed at various points along the Mississippi and other rivers within the State. (R. p. 92, 93, 103). If the State Gaugers would violate the law as proposed by the Complainant and the decree herein, by gauging the boat or boats which the Complainant would designate at various times and divers places, instead of gauging all the boats of the fleet at one and the same time and place, it would mean a useless expense to them, untold delays and inconveniences to both vendor and purchaser, to say nothing of confusion and evasions of the law involved in such a method of inspection.

Instances are given in the testimony, applying to all cases since the institution of this suit. (R. p. 107). Take that of the Tow J. B. Williams which came into the State on February 17th, 1907, containing 29 coal boats, one coke boat and one barge. The Gaugers gauged the whole fleet, but under the order of Court, Complainant first designated 11 boats, Nos. 9509, 9223, 9387, 9252, 9482, 9467, 9556, 9515, 9445, 9216 and 9524, (R. p. 105) for which certificates were issued. The boats then became separated and on March 6th, a second designation was made and certificate asked for boat No. 9419 of that fleet; on April 17th, one boat, No. 9214; on May 1st, seven boats, Nos. 9776, 9090, 9417, 9489, 9502, 9346, 9511; on June 17th, one boat, No. 9523; and on August 30th, one boat, No. 9497. Thus from February 17th, 1907, to August 30th, 1907, or during a period of six and a half months, if the decree herein is made to stand, the State Gaugers would have been compelled to make six inspections at perhaps six different places at intervals of weeks and months apart, whereas under the law, one inspection would have been sufficient. Aside from the useless expense and embarrassment to the service, the delays, confusion and inconveniences to all parties are apparent, (R. p. 105 to 107), as well as the temptation to successfully escape inspection and gauging of coal boats and barges subsequently sold whether in broken or unbroken packages. (R. p. 93). Following up this evidence, the witnesses urgently suggest that this proposed method of inspection inaugurated and confirmed by the decree herein would place the State Gaugers at the "mercy" of the Company and its agents to find out where those boats subsequently designated were. "I couldn't find them unless they pointed them out." (R. p. 106).

"Q. And if they failed to request a certificate of those boats subsequently designated, would or would there not be a possibility of the Company disposing of these boats without a gauge certificate? (Objection).

"A. Sure, they could easily do that.

"Q. In that event, what would be the position of the purchaser of those boats? (Objection.)

"A. Of course, he would be at the mercy of any one that took the boat out. Whatever he would sell it to him for, he would have no proof of what it contains."

(R. p. 106).

In refutation of the claim made that gauging is unnecessary where the coal contents of boats are peddled out or disposed of in parts, by weight, bushel and barrel to several purchasers, all the witnesses admit a relation between gauge and weight (R. p. 50, 91, 92, 96). Thus the average carrying capacity of a boat is approximately 25,000 bushels or 10,000 barrels. (R. p. 35, 39, 43). The State Gaugers certificate evidences this result, for example certificate of boat marked R. C. No. 10346, of the Towboat Sprague, shows 26,061.1 bushels or 10,023 barrels. (R. p. 117). What assistance does the certificate give where the sale of coal contained in the boat is by weight or by barrel instead of a full boat load? If 500 tons of mine-run coal are taken out of the boat and delivered to one purchaser, the invoice and delivery receipt annexed to the certificate would indicate that there was left in the boat 500 tons, or 5000 barrels, or say 12,500 bushels, figuring a ton of mine-run coal as the equivalent of 10 barrels of coal. Here the certificate of the full boat load and delivery receipts of the half of the boat of coal sold assist the Company's agent

in checking up the two deliveries as well as a security to the second purchaser of the remainder of the boat in seeing that he gets either the balance of 500 tons or 5000 barrels. (R. p. 50).

> "Q. Now, if you sell a man a part of a boat load of coal and deliver him a part of a boat load of coal, how does the coal gauger's certificate assist him?
>
> "A. Well, as a general rule when a party, to my knowledge, buys a portion of a boat load of coal, he either gets the top of the boat or he gets the bottom. If he gets the top he wants to know how much has been taken out; if he gets the bottom he wants to know how much has been left in."
> (R. p. 96).

In the case of peddling out, it is, therefore, clear that whilst the State Gaugers certificate may not be of any immediate benefit or direct advantage to the first, second or third purchaser of coal contained in the boat, by weight, bushel, barrel or other small receptacle, it is a benefit and a protection to the fourth or last purchaser, whether by weight, measure or residue of the coal contained in the boat. This conclusion is emphasized in the evidence and testimony relating to coal boat marked R. C. No. 10346, which arrived in the State on March 14th, 1908, long after the filing of the suit, and which was part of the fleet of Towboat Sprague. Of course, the State Gaugers gauged each boat of the tow or fleet upon its entering the State and prepared the certificate (R. p. 117), but this particular boat was among those not designated and no certificate demanded, though tendered. (R. p. 109).

In some manner not explained by the Complainant or its witnesses, albeit ample opportunity was afforded, a

part of this coal boat had been disposed of either by weight or barrel to one or more purchasers. The Company found a purchaser for the residue of the boat. There was nothing to prevent the disposal of that residue without the certificate; indeed as in the case of full boat loads of coal, if the decree herein remains, the Company could have dictated its own terms, it could have sold and delivered the coal remaining in the boat as a single package, by weight or by barrel, or without any certificate at all, and no one would have been the wiser, but for some reason or other not disclosed, the agent, Mr. Whann, called upon the gangers on May 12th, 1908, for a gauge of the residue. (R. p. 108, 109). The agent could have demanded the original certificate (D 3, p. 117) and by deducting the weight or its equivalent in bushels or barrels already disposed of, from the number of bushels or barrels shown by the certificate, ascertained thereby how much coal remained in the boat. Either because the delivery of the original certificate might have some effect upon the issue in this case, or might have exposed the necessity or expediency for gauging all boats as they cross the State line, or for some other reason not stated, or because the last purchaser required it, the residue was ordered gauged and accordingly a certificate of the gauge of said residue issued. (R. p. 109). (See also document marked Defendant 4, Defendant 5, R. p. 118, 119).

The above recited instances, which have general application to the handling of all coal boats and barges, (R. p. 68, 69) make it manifest, that none of the boats and barges not designated have been sold before, at or within the time fixed by law for gauging, that is to say as the tow enters the State (R. p. 67, 110). This is admitted by

Mr. Whann, the Company's Stock Keeper, to whom the certificates are usually delivered. He testifies:

"Q. When these coal boats come into the State of Louisiana, do you know what boats are to be sold in what you term broken and unbroken packages?

"A. I know some of them.

"Q. Those that you know of you require gauging?

"A. Yes, Sir.

"Q. Those that you don't know of you don't ask for gauging?

"A. Not until I make the sale and need the gauge.

"Q. Is it not a fact that all these boats are gauged?

"A. I understand so, I don't know.

"Q. But you don't require a certificate or demand a certificate of the inspectors?

"A. Not until I need it, where it is sold by the boat load. (R. p. 67, 68). * * *

"Q. The other boats for which you do not ask certificates have not been sold, either in whole or in part?

"A. No, sir." (R. p. 69). (See also R. p. 110).

In confirmation of the fact whereof this Court will take judicial notice, Complainant's President, George W. Thiess, contradicts the averments of the bill when he says: "It is a fact that there are NO known coal mines of any description whatsoever within the State of Louisiana, and it is a fact that no coal is produced or mined within that State, but that all coal within the State of Louisiana is shipped either by rail or water from other States of the Union, particularly Pennsylvania and Alabama." (R. p. 36). (See also R. p. 43).

ASSIGNMENT OF ERRORS.

Comes now Louis Knop and J. L. Rock, individually and as State Gaugers of coal and coke, by this Counsel, and respectfully represent that they feel aggrieved by the proceedings and judgment and decree of the Court in the above entitled and numbered cause, and assign error thereto as follows:

1st.—The Court erred in holding that Act 147 of 1888 and Act 80 of 1904 of the General Assembly of Louisiana do not apply to the inspection and gauging of all boats and barges or parts thereof, containing anthracite or bituminous coal, brought into the State for sale, or for delivery under sales made out of the State.

2nd.—The Court erred in holding that such inspection and gauging, as required by said Statutes, is not compulsory and is not necessary in case said boats or barges of coal and coke, or parts thereof, are intended to be subsequently sold, or are subsequently sold by barrel or box measure or by weight.

3rd.—The Court erred in holding that under Act 147 of 1888 and Act 80 of 1904, the right or duty of respondents in gauging and inspecting, is to be determined, not by the law, but by the instruction of the Complainants, and that such right, power or duty under the law becomes subordinated to the will, direction, intention and convenience of the Complainant.

4th.—The Court erred in holding that under said Act 147 of 1888 and 80 of 1904, the power of inspection and gauging of coal in boats and barges, or any part thereof, is limited and restricted according to and depending upon the terms and conditions of sale and mode of delivery prescribed by the vendor and vendee.

5th.—The Court erred in holding that only such boats and barges of coal or parts thereof, shall be ganged and the inspection fee paid when such boats and barges of coal shall be designated by the vendor.

6th.—The Court erred in holding that under Section 3, of Act 80 of 1904, no penalty accrues for failure or refusal of Complainant to notify respondents within twenty-four hours after the arrival in this State of any boat or barge loaded with coal or coke of such arrival, and requesting that said boat or barge loaded with coal or coke be ganged, save and except such as is sold or intended to be sold by coal boat or barge load to be designated by the Complainant.

7th.—The Court erred in failing and refusing to hold that to prevent fraud and imposition said inspection laws provide against the possibility and probability of evasion of their provisions, and accordingly the Court erred in its construction of said laws and by the decree which (under the right granted to Complainant to designate what coal boats or barges shall not be ganged) places it within the power of Complainant to evade inspection and gauging of said coal boats and barges or parts thereof, after their arrival in the State.

8th.—The Court erred in failing and refusing to hold that Acts 137 of 1894 and 58 of 1902, were not repealed by Act 80 of 1904, and in failing and refusing to hold that Acts 147 of 1888, 137 of 1894, 58 of 1902, 80 of 1904, were and are not in violation of Art. 29 of the Constitution of the State of Louisiana of 1898, or Article 1 of that instrument; and in failing and refusing to hold that said inspection laws above mentioned are not in violation of Article 1, Section 3, Clause 3, of the Constitution of the United States, and in refusing and failing to hold that said laws

are inspection laws, that all and each of said laws are not invalid or oppressive, nor do they deprive Complainant of its property without due process of law, nor of the equal protection of the law, as contemplated by the Fourteenth Amendment of the Constitution of the United States.

9th.—The Court erred in failing or refusing to hold that said above mentioned laws were passed as an incident to the police powerof the State and were designed and had for their object to protect the community from frauds and imposition, as well as to protect the said Complainant and its agents in the transactions had between them relative to the sale, disposition and delivery of the coal consigned and shipped to said agents in Louisiana; and to aid in the detection of crime and fraud the State's police power in that regard should not be surrendered to the Complainant and subordinated to its will by the decree herein, by authorizing such Complainant to direct when, where and under what circumstances and conditions dictated by it, the coal boats and barges, or parts thereof shall be gauged by the respondents.

10th. The Court erred in failing and refusing to hold that as there is no contest as to the reasonableness of the inspection fees, the case presents no judicial question, and the Court was without jurisdiction to regulate or prescribe the manner of the exercise of the respondent's duties.

ARGUMENT.

HAVE LOUISIANA ACTS 137, OF 1904, AND 58, OF 1902, BEEN REPEALED BY ACT 80, OF 1904? R. p. 5.)

ASSIGNMENT OF ERROR NO. 8.

For certainty, and complying with the rule of this Court relative to briefs in requiring Statutes of a State to be printed at length, or so much thereof as may be necessary, Act 147, of 1888, reads as follows:

"Entitled An Act for the appointment of two coal and coke boat gaugers, to fix their compensation, and to define their duties.

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That there shall be appointed by the Governor, by and with the advice and consent of the Senate, two coal and coke boat gaugers, who shall have their offices in the City of New Orleans; provided, however, that the Governor shall have the power to remove from office any coal and coke boat or barge gauger upon satisfactory proof made to him of negligence or official misconduct.

"Section 2. Each of said gaugers shall give bond, payable to the Governor or his successor in office, with two sufficient sureties, in the penal sum of five thousand dollars, conditioned for the faithful performance of the duties required of him by law.

"Section 3. It shall be the duty of said gaugers when called upon for that purpose, to gauge any coal or coke boat or barge in the port of New Orleans, or the State of Louisiana.

"Section 4. Such gauging shall consist in reducing the length, breadth and depth, inside measurement, of boats, or barges, deducting all obstructions and displacements, into cubic inches and dividing said cubic inches by twenty-six hundred and eighty-eight (2688), thus ascertaining the net measurement in bushels. Two and six-tenths (2 6/10) bushels shall constitute a barrel.

"Section 5. In all cases it shall be the duty of the

gaugers, or either of them, to respond promptly to any call made for their or either of their services, and to furnish a full and detailed certificate of gross measurement of the boat or barge gauged, and the allowance made for obstructions and displacements.

"Section 6. The fee for gauging or regauging shall be ten dollars ($10) for each boat, and five dollars for each barge, to be paid by the seller, except as is hereinafter provided.

"Section 7. The purchaser of any boat or barge of coal and coke, shall have the privilege of calling upon the said gauger or gaugers to regauge boats or barges in all cases where the original gauge is not satisfactory, and such regauge shall be adopted as the correct measurement. If the original gauge shall be found to be correct, then the purchaser shall pay the fee for regauging; but if the regauge shows a less measure, then the seller shall pay the fee.

"Section 8. No boat load of coal or coke shall be sold in this city or State until it has been inspected as provided for in this act. And any person who shall sell a boat load of coal or coke that has not been ganged as aforesaid, shall be liable to a penalty of fifty dollars ($50) for each boat or barge so sold, to be recovered, with costs of suit, in any court of competent jurisdiction, for the benefit of the Charity Hospital of New Orleans.

"Section 9. The term of office of said gaugers shall be four years. This act to take effect from and after its passage."

By an act approved July 12th, 1894, the Legislature passed Act 137:

"To compel the weighing or gauging in the State, of all bituminous and anthracite coal or coke sold in Louisiana by boat, barge or car load.

"Be it enacted by the General Assembly of the State of Louisiana:

"Section 1. That all anthracite or bituminous coal sold in this State, under the direction of the Governor by the State Gaugers, whose fees, duties and responsibilities shall remain as now fixed by law, provided the fee for weighing shall not exceed one cent per ton.

"Section 2. Be it further enacted, etc., That the standard measures for the bituminous and anthracite coal in this State shall be the barrel containing 6,988 cubic inches and the standard ton 2,000 pounds.

"Section 3. Be it further enacted, etc., That whoever shall violate the provisions of this act shall be adjudged guilty of a misdemeanor and shall be fined not less than $50, nor more than $100, at the discretion of the Court, for each offense."

As the first section of the foregoing law contained a clerical omission, or was so inartistically drawn, that section was amended by Act 58 of 1902, being:

"An Act to amend Act 137 of the session of 1894, entitled An Act to compel the weighing or gauging in the State of all bituminous or anthracite coal or coke sold in Louisiana by boat, barge or carload.

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That Section 1 of Act 137 of the session of 1894, be amended and re-enacted so as to read as follows:

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That all anthracite or bituminous coal sold in this State shall be gauged or weighed by the State Coal and Coke Gaugers, in the State, whose fees, duties and responsibilities shall remain as now fixed by law, provided the fee for weighing shall not exceed one cent per ton."

Act 80 approved July 1st, 1904, was next passed. It reads:

"Entitled an act to amend and re-enact sections 3, 5 and 8 of an act entitled 'An Act for the appointment of two coal and coke boat gaugers, to fix their compensation, and to define their duties,' being Act No. 147, approved July 12th, 1888.

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That Section 3 of Act No. 147 of the General Assembly of the State of Louisiana, approved July 12th, 1888, be amended and re-enacted so as to read as follows, to-wit: 'Section 3; It shall be the duty of said gaugers to gauge all boats and barges containing coal, whether anthracite or bituminous, or coke, brought into the State of Louisiana for sale or for delivery under sales made out of this State.'

"Section 2. Be it further enacted by the General Assembly of the State of Louisiana, That Section 5 of Act No. 147 of the General Assembly of the State of Louisiana, approved July 12th, 1888, be amended and re-enacted so as to read as follows: 'Section 5; In all cases it shall be the duty of the gaugers, or either of them, to respond promptly to any call made for their, or either of their services, and to furnish a full and detailed certificate of gross measurement of the boat or barge gauged, and the allowance made for obstructions and displacements, provided, however, that the failure to call upon them, or either of them, shall not relieve them, or either of them, of the obligation to gauge all coal and coke boats and barges as provided by Section 1 of this act.'

"Section 3. Be it further enacted by the General Assembly of the State of Louisiana, That Section 8 of Act No. 147 of the General Assembly of the State of Louisiana, approved July 12th, 1888, be amended and re-enacted as to read as follows: 'Section 8. No boat load of coal or coke, nor any part thereof, shall be delivered to the purchaser, whether

the sale thereof was made within or without the State, until it has been inspected as provided for in this act. And, any person, partnership, firm or corporation who shall sell or deliver in this State a boat load or a barge load of coal or coke, or any part thereof, that has not been gauged as herein provided, or who, within twenty-four (24) hours after the arrival in this State of any boat or barge loaded with coal or coke, shall not have notified said coal gaugers, or either of them, at their offices in the City of New Orleans, of its arrival in this State, requesting that the same be gauged as aforesaid, shall be liable to a penalty of fifty dollars ($50) for each boat or barge of coal or coke, or part thereof, so sold or delivered, and for each boat or barge so arriving in this State of which no notice was given to the said coal gaugers, to be recovered with costs of suit, in any court of competent jurisdiction, for the benefit of the Charity Hospital of the City of New Orleans.'

"Section 4. Be it further enacted by the General Assembly of the State of Louisiana, That this act shall take effect from and after its passage, and that all laws and parts of laws in conflict or inconsistent therewith, be and the same are hereby repealed."

The foregoing laws evidence the whole legislation on the subject of coal inspection. It is first claimed that Section 4, of the last Act (No. 80 of 1904), which repeals all laws or parts of laws in conflict or inconsistent therewith, has repealed, either expressly or by implication, Act 137 of 1894, and the Amendatory Act 58 of 1902.

There is no repealing clause contained either in Act 137 of 1894, or Act 58, of 1902; indeed, Act 147, of 1888, was re-affirmed by providing that the "fees, duties and responsibilities of the State Coal and Coke Gaugers shall remain as now fixed by law, provided the fee for weigh-

ing shall not exceed one cent per ton." Evidently, these two Acts (137, of 1894, and 58, of 1902) were passed for the purpose of providing for the weighing of coal when sold in the State by car load, without in any manner interfering with the provisions of Act 147, of 1888, which provided only for the gauging of coal and coke sold in the State by boat or barge load. The result of this legislation, therefore, was that all coal sold by the car load shall be weighed, whilst all coal sold by the boat or barge load shall be gauged.

Further discussion would be purely academical, as there is no pretense or suggestion that the Appellee is selling, or has sold coal by the car load, nor is there any pretense or suggestion that Acts 147, of 1888, and 80, of 1904, have been repealed. It is, therefore, immaterial whether or not these Acts, 137, of 1894, and 58, of 1902, have been repealed, though they evidence the policy of the State to increase the power and authority of the Coal Gaugers by making it their duty to weigh all coal when sold by the car load.

Putting these acts aside, we are brought to the next objection.

ARE ACTS 147, OF 1888, AND AMENDATORY ACT 80, OF 1904, VIOLATIVE OF ARTICLES 1 AND 29 OF THE STATE CONSTITUTION OF 1879, AND ARTICLES 1 AND 31 OF THE STATE CONSTITUTION OF 1898? (R. p. 5).

ASSIGNMENT OF ERROR NO. 8.

Article 1, of the Constitution of 1879, provides:

> "All government of right originates with the people, is founded on their will alone, and is instituted

> solely for the good of the whole, deriving its just powers from the consent of the governed. Its only legitimate end is to protect the citizen in the enjoyment of life, liberty and property. When it assumes other functions it is usurpation and oppression."

Article 1, of the Constitution of 1898, though couched in different language, means the same. It reads:

> "All government, of right, originates with the people, is founded on their will alone and is instituted solely for the good of the whole. Its only legitimate end is to secure justice to all, preserve peace and promote the interest and happiness of the people."

In State vs. Coal Co., 41 La. An. 465, 469, this objection was dismissed as frivolous.

Article 31, of the Constitution of 1898, is an exact reproduction of Article 29, of the Constitution of 1879. Both these articles provide that "Every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in its title."

A sufficient answer to these objections is that the same questions have long ago been decided by the Supreme Court of Louisiana in State vs. Coal Company, 41 La. An. 465, adversely to the present claim. True, that case involved Act 147 of 1888, and not No. 80, of 1904, but as the latter statute merely purports to amend and re-enact Sections 3, 5 and 8, of the former, it is thus brought within the decision on this point.

Accordingly, the Court will follow and adopt the opinion of the highest Court of a State when the question is one as to whether a statute of such State violates its Constitution. Merchants Bank vs. Pennsylvania, 167 U. S. 461; Michigan Central vs. Powers, 201 U. S. 291.

ARE THESE LAWS IN VIOLATION OF THE "COMMERCIAL CLAUSE OF THE FEDERAL CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3? (R. p. 5).

ASSIGNMENT OF ERROR NO. 8.

This question also seems to have been put at rest in Pittsburg & Southern Coal Co. vs. State, 156 U. S. 590. The distinction between State enactments having a direct object to regulate commerce between the States and those relating to the rights, duties and liabilities of citizens and only indirectly and remotely affecting the operations of commerce, has recently been reconsidered and approved in People ex rel. Silz vs. Hesterberg, No. 206, October Term, 1908, in an opinion by Mr. Justice Day, delivered November 2d, 1908.

DO THESE STATUTES DEPRIVE APPELLEE *OF THE EQUAL PROTECTION OF THE LAWS*,

ASSIGNMENT OF ERROR NO. 8.

This objection seems to have been passively or indirectly urged under the fourteenth paragraph of the Bill of Complaint (R. p. 6) wherein it is averred: "that they (the acts aforesaid) have never been acted upon as inspection acts; that coal from the State of Alabama, which has constantly and is yet arriving in coal boats and barges and in cars by railroad has never been and is not now held as subject to gauging or to weighing under any of said acts."

Evidence is given in the Record (R. p. 72 and 73) that before the present inspectors came into office, some Alabama coal had been shipped in barges into the State, which the predecessors of Appellants had failed to gauge.

Be that as it may, any dereliction of duty on the part of former inspectors is a matter that might arise in the administration of an unambiguinos law, but does not go to its validity. The Appellants are not bound by any omissions of their predecessors, and besides, there is no pretense that they do not "gauge everything that comes down the river, no matter what it is." (R. p. 110, 113, 115, 81, 82).

It is conceded that they do not gauge or weigh coal coming into the State by rail. No such duty is imposed upon them by Acts 137, of 1894, and 58, of 1902, which Appellee contends have been repealed. Since no one affeted by these acts is here complaining, their validity is of little concern, to say nothing of the impracticability of their enforcement by two officers in a State where car loads of coal are entering daily and hourly from the Arkansas, Texas and Mississippi lines. Then too, there is a clear dissimilarity of place, circumstance and condition between the two classes of cases. The length, breadth and principally the depth of a car load of coal, can be measured with the naked eye, whilst the depth of a boat loaded with coal is hidden from view and there is no way of ascertaining its contents, save by actual measurement. A reasonable distinction in principle exists here, a distinction both in the character of the trade and in the kind of package upon which the inspection is founded, consequently, a classification of the subjects of inspection, which, as in the case of taxation, is neither arbitrary, oppressive nor capricious. The Fourteenth Amendment was not intended to prohibit legislation, special, either in the extent to which it operates, or the objects sought to be attained. Pacific Express Co. vs. Seibert, 142 U. S.

339; American Sugar Refining Co. vs. State, 179 U. S. 89; Cooley vs. Board of Wardens, 12 How. 299; Turner vs. Maryland, 107 U. S. 38. In Pittsburg & Southern Coal Co. vs. State of Louisiana, 156 U. S. 590, 600, 601, it was held:

> "Nor is there any discrimination in the transportation of the coal and coke from Alabama and that from Pennsylvania as in any respect impairs the efficiency of the law of Louisiana. The difference between the transportation of coal and coke from Pennsylvania and from Alabama is only the difference arising from one being transported by water and the other by land. There is a difference arising between water and land carriage, arising from the nature of the two modes, but not one created by legislation, direct or indirect, or by any efforts of the State Legislature to give or recognize a discrimination in the case of either."

DO ACTS 147, OF 1888, AND 80, OF 1904, CONSTITUTE DUE PROCESS OF LAW? (R. p. 6).

ASSIGNMENT OF ERROR NO. 8 AND NOS. 1 TO 10 INCLUSIVE.

Since this Court has decided in Pittsburg & Southern Coal Co. vs. State, 156 U. S. supra, that the provisions of Act 147, of 1888, "are properly to be regarded as a part of those innumerable police regulations which every State may enact for the convenience and comfort of its inhabitants in the conduct of their business," and since the Supreme Court of Louisiana has held in State vs. Coal Co., 41 La. An. supra, that Act 147 of 1888 makes it compulsory upon the State Gaugers to gauge and inspect all coal boats entering the State, the affirmance of those decisions by Act 80, of 1904, should receive recognition.

The real purpose of this suit is to strike down this latter statute, particularly Section 3, which prohibits the sale and delivery of any boat of coal or coke, or any part thereof, until it has been gauged, and provides for a penalty for failure and refusal on the part of any owner of such boat of coal, or any part thereof, destined for sale and delivery, to notify the State Gaugers within twenty-four hours of its arrival in the State, together with a request that the same be gauged. (See Section 3, R. p. 87).

Hence it is, under Article 1, of the State Constitution of 1879, and 1898, cited by our opponents, that is to say, under the police power, the legislative design was to prescribe the duties and obligations of the inspectors by compelling them to gauge all boats, whether fully or partially loaded with coal, within a reasonable time upon entering the State, or suffer the consequences of their dereliction of duty for non-feasance in office. (Revised Statutes of Louisiana, Sec. 872, Act 120 of 1855) and the duties and obligations of the seller by compelling him to notify the Inspectors of the arrival of the boats, whether fully or partially loaded with coal, requesting, that is to say, designating that same be gauged or suffer the penalty of $50.00 for each coal boat or part thereof not so notified or designated.

Appellee contends that, while it has been held that the coal guaging law may be enforced against it in every instance where it may sell or otherwise dispose of a boat or barge of coal, by the boat load or barge load, it cannot be made to submit to a gauging of such boats and barges as may be sold in what appellee chooses to term "broken packages," and that Act No. 80 of 1904, in so far as it provides that the coal gaugers shall guage all boats and

barges containing coal sold or delivered in this State, where a part only of such boat or barge is sold or delivered, or where such boat or barge is sold in broken lots to several persons, is a taking of property without due process of law.

We confess our inability to appreciate the distinction thus sought to be made. If Act No. 147 of 1888 is constitutional, as has been declared by this Court, as a valid inspection law which the Legislature of the State of Louisiana had the right to enact in the exercise of its police power, in what respect, we ask, can it be contended that Act No. 80 of 1904, which may be said merely to have enlarged the power of the coal gaugers, so that no possibility of fraud, in administering the law, could arise, be deemed void?

If, in other words, a statute which requires the gauging of coal by State coal gaugers when sold by the boat load or barge load, is constitutional, as a valid inspection law which a State may enact, why is a statute, which requires such gauging to be done where the coal is sold from such boats or barges in less than a boat load or barge load, not equally constitutional as a valid inspection law? If the State of Louisiana had the right to enact a law in the one case, she certainly had the same right to enact one in the other, since the whole matter is, after all, one entirely within the discretion of the Legislature as in its judgment will best subserve the welfare of the people of the State.

One can well see how easy it would be for appellee, or any other person or corporation, to evade the provisions of Act No. 147 of 1888, should it be held that Section 8 of that act, as amended by Act No. 80 of 1904, is unconstitutional, or that it only applies to full boat loads.

Let us illustrate. Suppose a tow of coal boats and barges should be destined for sale or delivery in the State of Louisiana by the boat load or barge load. Under the provisions of Act No. 147 of 1888 the same would be subject to gauging by the gaugers, who would be entitled to the fees provided therein. On the other hand, if the gaugers may be permitted to gauge only whole boats and barges of coal, when sold as such, and to receive compensation for their services only in such cases, how easily the entire law on the subject of coal gauging might be set at naught by selling from the boats and barges referred to, before reaching the border line of the State of Louisiana, or even after reaching that State, a part of the coal contained in each boat or barge, be the quantity ever so small, if it should be held that the gaugers can only gauge such boats and barges containing coal as may be sold by the entire boat load or barge load. The result would be that, although it has been decided by this Court that Act No. 147 of 1888 is constitutional, its provisions could be evaded and the act utterly emasculated by reducing the quantity of coal contained in boats and barges brought into the State for sale or delivery, by selling therefrom even a very small quantity, should it be declared that that part of Act No. 80 of 1904, amending Section 8 of Act No. 147 of 1888, requiring coal gaugers to gauge all coal boats and barges, regardless of the fact that the coal contained therein may be sold therefrom in part or as a whole boat or barge, is tantamount to confiscation.

Once admit that the Legislature of the State of Louisiana had no authority to require the gauging of all coal boats and barges where the coal contained therein is sold in part or in broken lots to more than one person, and

not by the boat or barge load, and the entire effectiveness of Act No. 147 of 1888 will itself be destroyed or rendered so inoperative and impotent as to make its provisions valueless from a standpoint of inspection.

There can be no doubt that Acts No. 147 of 1888, and No. 80 of 1904 were passed by the Legislature of the State of Louisiana in the exercise of the police power which that body intended to put forth, and which we believe this Court will be loath to interfere with or hamper. It has been said that the authority of a State in matters affecting its internal police "is complete, unqualified and exclusive; and that among these powers are inspection laws, etc." Parker & Worthington on Public Health and Safety, page 3 (Ed. of 1892). As inspection laws, they must be recognized and sustained as valid unless clearly and palpably violative of the Federal Constitution. The right in the States to enact such laws is expressly recognized by and reserved in said Constitution, Art. 1, Sec. 10, clause 2, and Amendment XI.

It is now elementary, that the discretion of the State in enacting laws in the interest of its citiezns, the regulation of its internal affairs and commerce, and to subserve the general comfort, good order and welfare, will not be questioned or nullified unless such laws unequivocally violate some power expressly delegated by the Constitution to the Federal Government, or, by said organic instrument, is prohibited to the States.

So it has been stated by the most approved text writers and held by a long and uniform jurisprudence of the highest courts of the States, and by this Court, to be the true doctrine that, while such laws are subject to judicial scrutiny, in that their validity may be tested and determined, in

reviewing and construing laws enacted by the State, under her police powers, apparently and avowedly in the public interest, to promote the general safety and welfare and to protect persons from fraud and imposition, every intendment must be made and taken in favor of the validity of the enactment, and the legislative discretion will not be disturbed or annulled unless, on its face, such police regulation is clearly unreasonable, oppressive or discriminatory, and bears no fair or legitimate relation to the subject matter sought to be affected.

The propositions thus stated now, we think, to be regarded as horn-book law, could not, possibly, be better sustained and elucidated than by reproducing, in part, the exact language employed by great authors and judges who have been engaged in the consideration and exposition of the principles involved. This we take occasion to do for the convenience of the Court, and to facilitate the investigation rather than to attempt to enlighten the Court upon principles with which, we feel perfectly assured, are so familiar.

In the celebrated leading case of *Gibbons vs. Ogden*, Ch. J. Marshall says:

> "They (inspection laws) form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the General Government; all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for the regulation of the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass." 9 Wheaton 202.

In *Jacobson vs. Massachusetts*, Mr. Justice Harlan says:

> "The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this Court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description'; indeed, all laws that relate to matters completely within its territory, and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Gibbons vs. Ogden* 9 Wheat. 1-203; *R. R. Co. vs. Husen*, 95 U. S. 465, 470; *Beer Co. vs. Mass.*, 97 U. S. 25; *N. O. Gas Co. vs. La. Light Co.*, 115 U. S. 650, 661; *Lawton vs. Steele*, 152 U. S. 133. It is equally true that the State may invest local bodies called into existence for the purposes of local administration with authority in some appropriate way to safeguard the public health and public safety. *The mode or manner in which these results are to be accomplished is within the discretion of the State*, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of State legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police power of a State, must always yield in case of conflict with the exercise by the General Government of any power

it possesses under the Constitution, or with any right which that instrument gives or secures. *Gibbons vs. Ogden*, 9 Wheat. 1, 219; *Sinnot vs. Davenport*, 22 How. 227, 243; *M. K. & T. Ry. Co. vs. Haber*, 162 U. S. 613, 626." And again: "There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect to his person or his property, regardless of the injury that may be done to others. This Court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity; of the perfect right of the Legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.' *R. R. Co. vs. Husen*, 95 U. S. 465, 471; *M. K. & T. Ry. Co. vs. Haber*, 169 U. S. 613, 628, 629; *Thorpe vs. Rutland & B. R. R.*, 27 Vermont 140, 148. *In Crowley vs. Christenson*, 137 U. S. 86, 89, we said, 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others. It is then liberty regulated by law.'" And again: "*If there is any such power in the judiciary to review legislative action in respect*

of a matter affecting the general welfare, it can only be when that which the Legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution." 197 U. S. 25, 26, 31 and 38. (Italics ours.)

In *Patapsco Guano Co. vs. North Carolina*, Mr. Chief Justice Fuller says:

> "Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matters of public concern, it is within the protective power of the State to intervent." 171 U. S. 358. And again. "Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self protection commonly called the police power." Ib. 357.

Parker & Worthington (Public Health and Safety), (Ed. 1892), commenting upon the extent of legislative authority in such matters, declare that "as to the necessity or the expediency of the legislation, the Legislature has a discretion which will not be reviewed by the courts; for it is not a part of the judicial functions to criticize the propriety of legislative action in matters which are within the authority of the legislative body," Page 5, Sec. 4; *Mugler vs. Kansas*, 123 U. S. 623, and other authorities

cited in foot note 2. See, also, Lawton vs. Steele, 152 U. S. 136.

In *Powell vs. Pennsylvania*, 127 U. S. 678, this Court decided that, unless it appears upon the face of a statute, or from facts of which a Court may take judicial notice, that such statute impairs rights secured by the fundamental law, a legislative determination as to the necessity for the enactment of the statute and the expediency of the means adopted to secure the public welfare, will be conclusive upon the courts and not reviewable judicially. Here is the rock upon which our opponents have stumbled.

There is nothing from which it can be inferred that the Legislature, in passing these laws, intended to make them a mere cover for obtaining revenue. The fees do not belong to the State. They go to the gaugers in compensation for the actual cost of the services rendered. Their collection has been recognized and enforced in all cases, without exception or question, for many years past. Even the appellee has acquiesced therein prior to the institution of this suit. It has also, by its bill, expressed a willingness to continue paying for the gauging of those coal boats and barges to be designated by it as may be sold or otherwise disposed of by the boat or barge load, and the constitutionality of the laws is judicially admitted when so applied. Confessedly, therefore, as the statutes have a real and substantial relation to the public welfare in their purpose to prevent fraud and crime, and as no issue is presented challenging the reasonableness of the inspection charges considered as such, no hardship or inconvenience to the appellee and those similarly situated in the administration of these laws, the case is taken from judicial inquiry. Who is to determine the necessity or

expediency for notice, designation and gauging within twenty-four hours after the boats enter the State, so that there could be no likelihood of delivery of coal boats or any part thereof to any purchaser without having been gauged? Is the determination for the Legislature or the Courts? Clearly, the matter involves discretion, but a discretion that is legislative, not judicial. This proposition has recently received approval in People ex rel. Silz vs. Hesterberg, No. 206, October Term, 1908, affirming 184 N. Y. 126, in an opinion delivered by Mr. Justice Day, wherein he says:

> "But, subject to constitutional limitations, the Legislature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the State, a misdemeanor. * * * * It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another State or country. The object of such laws is not to affect the legality of the taking of game in other States, but to protect the local game in the interest of the food supply of the people of the State. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the State, and as such to be declared void because contrary to the Fourteenth Amendment of the Constitution."

But the learned Judge of the Circuit Court says (R., p. 123):

> "In determining the meaning of a statute, the principal canon of construction is that by which the purpose of the legislator is determined, and the purpose of the legislator is best determined by ascertaining whether any one will, or will not be, benefited by a particular construction.
>
> "To make the Inspection Statute apply to boat loads or barge loads which are not sold in their entirety, but which are to be retailed to numerous purchasers, would protect no one and would accomplish no purpose that I can see. Suppose, for example, Barge No. 1 is brought into the State of Louisiana by the plaintiff company, with the intention of retailing the coal in it to any person who may apply to buy any part of that coal—50 tons may be sold at Baton Rouge, 100 tons at Bayou Sara, 200 tons at Donaldsonville and the remainder at New Orleans. None of these purchasers would receive any possible benefit from the fact that the entire barge load had been inspected when the barge entered the State of Louisiana, and its entire contents there determined. Each purchaser buys a given number of tons of coal and weighs the coal delivered to him to ascertain that he gets the quantity purchased. The weighing by such individual purchaser has no sort of relation to the inspection of the entire barge load.
>
> "I think that a reading of the several acts indicates clearly that the purpose of the lawmaker was to require inspection of all of those barge or boat loads which were sold in their entirety, or where the sale was of some definite fraction of a boat load, as, for example, a half, or a fourth, etc."

In the first place, not a pound or bushel of coal in any of these boats has been sold or is to be delivered to any

known purchaser when the boat comes into the State, save in the case of full boat loads. In the latter instance, the necessity of gauging as a benefit to the purchaser and as a check against fraud and deceit is conceded. Accordingly, appellee has designated for inspection these full boat loads and pays the inspection fee. If (as in the case of the Tow J. B. Williams referred to in the first part of this brief) a full boat load of coal that has not been designated, is subsequently sold, then the gaugers are to gauge it wherever it is and whenever pointed out by the agents. This scheme, or course, sought to be accomplished by the decree, takes the execution of the law out of the hands of the officers and places it under the control of appellee, and those similarly situated, whose interests are to evade its provisions. Manifestly, such a result, if sanctioned by a court of equity, under the guise of construing an unambiguous statute, would strike not only at the foundation of these laws and the reasons which actuated the Legislature in passing them, but would effectually nullify every other inspection law designed for the public safety.

In the next place, it is not the province of the judiciary to construe away the meaning of statutes or find meanings in them the Legislature never held. There is no room for any construction of Act 80 of 1904 as attempted by the Circuit Court, and it is wholly inadmissible to say that when the Legislature, in unmistakable terms, provides for prompt gauging of all coal boats as they enter the State, that body meant to include an exemption or suspension in favor of those coal boats, or parts thereof, where the seller intends at some future day not stated and after the time fixed by law for gauging has passed, to dispose of the contents of such coal boats in broken pack-

ages. The statutes make no such exception or provide for no such suspension, and consequently, the Court ought not to create any. Nor can it be gathered from both the special and final purpose of the statutes that the Legislature, either in terms or by necessary implication, has turned over to this appellee the administration of the laws, to do with them as its conscience dictates or its pleasure permits. However honest the coal dealer may be, the State alone has the power, and it is its duty in caring for the public good to lead him not into temptation.

These observations sufficiently answer the question propounded in the opinion, as to "who will, or will not, be benefited by a particular construction" of these laws. The Circuit Court has failed to see that the benefit it accords is dependent upon the direction, intention, good or bad faith of those least liable to give effect to the gauging laws, and not upon the legislative will and discretion.

The example given in the opinion has faint application. It falls short of its purpose since the Court forgets to inform us how many tons, bushels or barrels of coal there are in the "remainder (of the boat) at New Orleans." The last purchaser of the "remainder at New Orleans" wouldn't know what was left in the boat unless he had some means of determining how many tons or bushels it originally contained when coming into the State and how many had since been taken out. Now, if the boat had been gauged when it arrived in the State, and the gauger's certificate showed it contained 10,000 barrels or its equivalent of 1,000 tons, and 50 tons were sold at Baton Rouge, 100 tons at Bayou Sara, 200 tons at Donaldsonville, the purchaser "of the remainder at New Orleans"

would know, by means of the certificate, that 650 tons, or 6,500 barrels, were left. In that case, would he not be purchasing a part of a boat load of coal, and if delivered without the certificate would not the prohibition and penalty contained in Section 3 of Act 80 of 1904 apply?

Again, it will not do to say, "To make the Inspection Statute apply to boat loads or barge loads which are not sold in their entirety, but which are to be retailed to numerous purchasers, would protect no one and would accomplish no purpose that I can see." (R., p. 125.) This view of the Coal Inspection Acts is too narrow, since, as we have seen, the public welfare is involved, and as it appears upon the face of this statute, "the object of the inspection is the prevention of imposition on the public generally." Patapsco Guano Co. vs. Board of Agriculture, 171 U. S. 357. The whole proposition seems to have been disposed of by Mr. Justice McKenna, in St. John vs. People of New York, 201 U. S. 633, 637:

> "If we could look no further than the mere act of selling, the injustice of the law might be demonstrated, but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose."

The ultimate purpose of the Acts of 1888 and 1904 is the protection of the purchaser of coal boats, or any part thereof, in that through the gaugers' certificate he may have the assurance that he is not getting, figuratively speaking, a "pig in a poke," as also the protection of both the owner of the coal and his agents and servants in their transactions relative to the handling of the coal.

To prevent any person from selling or otherwise disposing of a coal boat, or any part thereof, under the claim or pretext that it had been gauged, when it had not; to prevent the seller from successfully defeating the collection of penalties prescribed; to prevent any tampering with the coal boat from the time it reaches the State until it gets into the hands of the purchaser of such coal boat, or any part thereof; as also to prevent the agents of the vendor from practicing deceit upon their principal or the vendor upon the agents, and as a check against these contingencies,—all these, and more besides, furnish the special purpose of these laws, which has received no consideration whatever by our opponents.

Aside from the relation between weight and gauge to which we have adverted in the statement of the case, and the necessity of a certificate for the last purchaser of the remaining contents of a coal boat in the case of peddling out, the possibilities of perpetrating commercial frauds, where no request or designation for gauging is made within twenty-four hours after the boats reach the State, become apparent. Even were it as contended for, we maintain that no person or set of persons can, by his or their executory contract, change, modify or abrogate the positive provisions of an inspection law which acts upon the subject before such contract is executed. Surely, no amount of subtleties or refinements of thought or language can give to this statute a meaning which destroys its purpose or confer upon parties the right and opportunity to practice deception, and, as tersely put by this Court in the last lines of Chief Justice Fuller, in Patapsco Guano Co. vs. Board of Agriculture, 171 U. S. 345, 631: "The Con-

stitution of the United States does not secure to any one the privilege of defrauding the public."

Respectfully submitted,

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E. HOWARD McCALEB, JR.,
For Appellants.

Supreme Court of the United States

October Term, 1915.

No. 449

LOUIS KNOP and JOSEPH L. BECK, Individually and As Gaugers of Coal and Coke,

Appellants,

versus

THE MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY,

Appellee.

Brief for Complainant and Appellant.

Chas. C. Reed,
J. Comerford Fox,

Solicitors for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 449.

LOUIS KNOP AND JOSEPH L. ROCK, INDIVIDUALLY AND AS GAUGERS OF COAL AND COKE,

APPELLANTS,

VERSUS

THE MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY,

APPELLEE.

BRIEF FOR COMPLAINANT AND APPELLEE.

Appellee is a Pennsylvania corporation engaged in mining and selling bituminous coal. It ships, by coalboats and barges, down the Ohio River to points in the State of Louisiana, on the lower Mississippi, the equivalent of, say, eight hundred to one thousand boatloads of coal per annum, and has done so since its organization, October 1,

1899. These coalboats are, say, 160 feet long, 26 feet wide, and 10 feet deep, and contain, loaded, from nine to ten thousand *barrels,* or nine hundred to a thousand *tons,* of coal. Barges have about one-half the capacity of boats. Boats or barges so loaded are made up at Pittsburg, Pa., into "*tows*" of from thirty to fifty or more, and brought down to their destination under charge of powerful towboats, and, *arriving* in Louisiana, are moored *in fleets,* principally at Bayou Sara, Baton Rouge, Philadelphia Point and New Orleans, convenient for use or the requirements of commerce, and where they are protected and cared for until sold or otherwise disposed of.

The bill of complaint shows, paragraph 6, that, prior to two or three years before its filing, the coal so transported was, to the extent of one-half or more, sold and delivered to planters for use and consumption principally on sugar plantations, and that such sales were usually by the coalboat or barge load—that is, *in unbroken packages;* but that, in consequence of the introduction and general use of *fuel oil,* the sales for such consumption and use have been greatly reduced, and for the year preceding did not exceed thirty-five or forty boat- or bargeloads—that is, *unbroken packages*—and were not likely to exceed that amount during the year to come likely to exceed that amount during the year to come. (Tr., pp. 1, 2.)

It also shows that appellee sells and delivers, in *unbroken packages,* to *dealers* in Pittsburg coal in the neigh-

borhood of New Orleans an average amount of, say, 125 loaded coalboats or barges, and anticipates a continuation of like sales in the future (p. 2).

Appellee's principal business, however, is the selling of its coal *by the barrel, or by weight, from broken packages,* the actual measurement or weight being determined at the time of delivery to the purchaser; and it is charged that, in such case, the ascertainment of the cubic or weight contents of the *entire* boat- or barge-load is of no use, guide, value or benefit to either the complainant or the person to whom such coal is sold and delivered, and protects neither one party nor the other (p. 3).

The bill charges, also, the consumption by complainant annually, of sixteen boatloads of such coal, more or less, for its own uses (p. 3).

On July 12, 1888, was enacted by the General Assembly of Louisiana "an act for the appointment of two Coal- and Cokeboat Gaugers, to fix their compensation and define their duties."

The gaugers were to be appointed by the Governor, with the advice and consent of the Senate, to have their offices in New Orleans, and give bond for the faithful performance of their duties. They were, when called upon, to gauge any coal- or coke-boat or barge in the Port of New Orleans or State, such gauging to consist in reducing the length, breadth and depth, inside measurement, of boats or barges, deducting all obstructions and displacements, into cubic inches, and dividing the result by 2,688,

thus ascertaining the net measurement in *bushels;* and two and six-tenths bushels were to constitute a *barrel.*

By this statute it was made an offense, punishable by fine, to sell any *boatload* of coal or coke in the State or City of New Orleans until "inspected" (p. 3).

The gaugers' fees were fixed at $10 for each boat and $5 for each barge gauged, to be paid by the seller (p. 3).

An abortive act (No. 137) of the General Assembly, approved July 12, 1894, entitled "An act to compel the weighing or gauging in this State of *all* bituminous or anthracite coal or coke sold in Louisiana by boatload or carload"; and an act (No. 58), approved June 26, 1902, entitled "An act to amend Act No. 137 of 1894, entitled 'An act to compel the weighing or gauging in the State of *all* bituminous or anthracite coal or coke sold in Louisiana by boat, barge or car load' " (see bill, paragraphs 8 and 9, p. 4), are parts of the history of the State legislation on the subject of gauging of coal and coke, and will be more particularly referred to hereafter.

The last of the legislation complained of is Act No. 80 of the General Assembly of the State, approved July 1, 1904, being an act to amend and re-enact Sections 3, 5 and 8 of the Act of 1888.

By Section 1 thereof it was declared to be the duty of the gaugers to gauge all boats and barges containing coal, whether anthracite or bituminous, or coke *brought into the State of Louisiana* for sale. By Section 2, failure to require the services of the gaugers was declared not to relieve them of the obligation to gauge all such coal- or

coke-boats and barges; and by Section 3 thereof it was provided that no boatload of coal or coke, *or any part thereof*, should be delivered to the purchaser, *whether sale thereof was made within or without the State, until it had been inspected* as prescribed. Any person selling or delivering in Louisiana a boat- or barge-load, or *any part thereof*, not so gauged, or who should not, *within twenty-four hours of the arrival of such boat* or barge in *this State*, have *notified* either or both said gaugers, at their offices in New Orleans, of such arrival, *requesting* that the same be gauged, was declared subject to a penalty of $50 for each boat or barge, *or part thereof*, so sold and delivered, and for each boat or barge so arriving of which arrival no notice was given. (Bill, par. 10, pp 4, 5.)

In paragraph 11 of the bill (p. 5) the several acts of the Legislature complained of are charged as violative of Article 29 of the Constitution of Louisiana of 1879, in force up to 1898, and of Article 31 of the Constitution of 1898, in operation thereafter, both of which articles ordain that every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in its title, as well as in violation of Article 1, Section 8, clause 3, of the Constitution of the United States, which ordains that the Congress shall have power to regulate commerce with foreign nations, and among the several States and the Indian tribes.

In paragraph 12 (pp. 5, 6) complainant charged that, while at all times denying the validity of the acts in ques-

tion, he has not heretofore contested same, as purchasers of unbroken packages of coal have ordinarily accepted the gaugers' certificates as approximately correct, and that he is still, but for convenience only, willing to pay said gaugers their fees for gauging boats and barges intended to be sold as unbroken packages; that, as to coal to be sold otherwise than in unbroken packages, the services of the gaugers are of no advantage or protection to either complainant or purchaser.

It is also charged to be the custom of the gaugers to meet the *tows* of coal *as they enter the State, via the river*, and there gauge each and every boat or barge, *irrespective of whether the same is to be sold as an unbroken or a broken package—i. e., in quantities less than a boat or barge load—and to demand fees therefor,* all of which is charged to be to the manifest wrong and injury of complainant; and it is charged that the acts of the General Assembly referred to are not inspection acts within the meaning of the Constitution of the United States, and are invalid, and *deprive him of his property without due process of law* (p. 6).

Complainant charges, further, that he has paid, annually, since 1899, say, from $8,000 to $10,000 to the persons serving as gaugers as fees demanded under said acts, and that they will continue to demand like fees for time to come so long as complainant's business continues; that his interest in the controversy exceeds $2,000, exclusive of interest and costs, and arises under the Constitution and laws of Louisiana and of the United States (p. 7).

The relief asked for is by injunction, restraining the defendants and their successors in office from demanding or collecting money for services or as fees for gauging the coal of complainant, whether in coalboats, barges or other receptacles, save and except such as is sold or intended to be sold by boat- or barge-*load*, to be designated, and for further decree that the defendants are without right or authority to demand or collect from complainant money or fees as gaugers of coal or coke under any valid and existing law of Louisiana, whether such coal be in coalboats, barges or other receptacles or packages, save as such may be payable for gauging coal sold or intended for sale by coalboat or barge *load*, to be designated (p. 8).

II.

Respondents admit the truth of most of the recitals of fact in the bill, but aver that *all* the coal in boats and barges brought annually into the State by complainant is sold and delivered by boat- or barge-*load*, and say that, if true that a part of the coal so brought into the State *be sold and delivered by the barrel or weight, or in broken packages*, without relation to the quantity or weight in such boats or barges, but by actual measurement or weighing at the time of delivery to the purchaser, "nevertheless it was entirely competent for the State of Louisiana, *as was done by and through certain acts passed by the General Assembly of that State, and which are* complained of by complainant in the bill of complaint, to provide for the gauging of *all* such boats

and barges, *whether* the coal be *sold or delivered by the whole boat- or barge-load, or part of same, in the exercise of the police power of said State*" (pp. 19-21).

They aver that complainant has never denied the validity and binding force of the acts in question, has long acquiesced therein and complied with the provisions thereof in every respect, and is, hence, estopped from contesting the same. (Par. 6, p. 21.)

They deny that the gauging of coal as complained of serves no useful or beneficial purpose, and aver that it has been finally determined by the Supreme Court of Louisiana and by the Supreme Court of the United States that the acts in question "are legal and valid and constitutional, as proper *inspection* laws of the State of Louisiana, which that State had the right to enact in the exercise of the police power of the State" (p. 21).

In paragraph 8 of the answer (p. 21) respondents aver it to be true that they have been and are accustomed to meet the coal tows or fleets of complainant *as they enter the State of Louisiana* and to gauge each coalboat or barge therein *intended for sale or delivery to others* in the State, and thereafter to demand of complainant, as they aver the legal right to do, the fees fixed by the acts referred to, and aver that it is true that they will continue so to do.

They deny that any of the coal so introduced into the State of Louisiana and gauged by them is intended for the use of or is consumed by complainant.

They reiterate that the acts in question are valid and constitutional *inspection laws*, not oppressive, not depriving complainant of his property without due course of law; that they will continue to gauge *all* boats and barges of coal brought by complainant *into the State and demand fees for the service*, and aver, also, that they will gauge no other coal except that sold by complainant or intended by it for sale to others in Louisiana.

III.

So much of the statutes of Louisiana as have reference to the matter in question follow:

(a.)

Act of 1888, Session Acts, p. 207:

"An act for the appointment of two coal- and coke-boat gaugers, to fix their compensation and to define their duties:

"SECTION 1. * * * There shall be appointed by the Governor, by and with the advice and consent of the Senate, two coal- and coke-boat gaugers, who shall have their offices in the City of New Orleans. * * *

"SEC. 2. Each of said gaugers shall give bond, payable to the Governor, or his successor in office, in the penal sum of five thousand dollars, conditioned for the faithful performance of the duties required of him by law.

"SEC. 3. It shall be the duty of said gaugers, when called upon for that purpose, to gauge any coal- or coke-boat or barge *in the Port of New Orleans or the State of Louisiana.*

"SEC. 4. Such gauging shall consist in reducing the length, breadth and depth, inside measurement,

of boats or barges, deducting all obstructions or displacements, into cubic inches, and dividing said cubic inches by twenty-six hundred and eighty-eight (2,688) thus ascertaning the net measurement *in bushels*. Two and six-tenths (2 6/10) bushels shall constitute a barrel.

"SEC. 5. In all cases it shall be the duty of the gaugers or either of them to respond promptly to any call made for their, or either of their, services, and to furnish a full or detailed certificate of gross measurement of the boat or barges gauged and the allowances made for obstructions or displacements.

"SEC. 6. The fee for gauging or regauging shall be ten dollars ($10) for each boat and five dollars for each barge, *to be paid by the seller*, except as hereinafter provided.

"SEC. 7. The purchaser of any boat or barge of coal or coke shall have the privilege of calling upon the said gauger or gaugers to regauge boats or barges in all cases where the original gauge is not satisfactory, and such regauge shall be adopted as the correct measure. If the original gauge shall be found to be correct then the purchaser shall pay the fee for regauging; but, if the regauge shows a less measure, then the seller shall pay the fee.

"SEC. 8. No boat-*load* of coal or coke shall be sold in this city or State until it has been inspected as provided for in this act. Any persons who shall sell a boat-*load* of coal or coke that has not been gauged as aforesaid shall be liable to a penalty of fifty dollars ($50) for each boat or barge so sold, to be recovered, with costs of suit, in any court of competent jurisdiction, for the benefit of the Charity Hospital of New Orleans."

By Section 9 the term of office of gaugers was fixed at four years.

(b.)

Act 137 of 1894, Session Acts, p. 172:

"An act to compel the weighing or gauging in the State of *all* bituminous or anthracite coal or coke sold in Louisiana by boat, barge or car-*load.*

"SECTON 1. That all anthracite or bituminous coal sold in this State under the direction of the Governor by the State gaugers, whose fees, duties and responsibilities shall remain as now fixed by law, provided the fee for weighing shall not exceed one cent per ton. *(Sic.)*

"SEC. 2. * * * That the standard measures for the bituminous and anthracite coal in this State shall be the *barrel* containing 6.988 cubic inches and the standard ton of 2,000 pounds.

"SEC. 3. * * * That whoever shall violate the provisions of this act shall be adjudged guilty of a misdemeanor and shall be fined not less than $50 nor more than $100. "

(c.)

Act of 1902, Session Acts, p. 81:

"An act to amend Act 137 of the session of 1894, entitled 'An Act to compel the weighing or gauging in the State of all bituminous or anthracite coal or coke sold in Louisiana by boat, barge or carload.

"SECTION 1. * * * That Section 1 of Act 137 of the session of 1894 be amended and re-enacted so as to read as follows:

" 'SECTION 1. *Be it enacted,* * * * that *all* anthracite and bituminous coal sold in the State shall be gauged or weighed by the State Coal and Coke Gaugers in the State, whose fees and responsibilities shall remain as now fixed by law, provided the fee for weighing shall not exceed one cent per ton.' "

Act of 1904, Session Acts, p. 201:

(d)

"An act entitled an act to amend and *re-enact* an act entitled 'An act for the appointment of two coal- and coke-boat gaugers, to fix their compensation, and to define their duties,' being Act No. 147, approved July 12, 1888."

Section 1 thereof amends and re-enacts Section 3 of the act referred to so as to read:

"It shall be the duty of said gaugers to *gauge all* boats and barges containing coal, whether anthracite or bituminous, or coke, *brought into the State of Louisiana for sale or for delivery under sales made out of the State.*"

Section *2* amends and re-enacts Section 5 of the Act of 1888 so as to read:

"In all cases it shall be the duty of the gaugers, or either of them, to respond promptly to any call made for their, or either of their, services, and to furnish a full and detailed certificate of gross *measurement* of the boat or barge *gauged*, and the allowance made for obstructions and displacements; *provided*, however, that the failure to call on them, or either of them, shall not relieve them, or either of them, of the obligation to gauge *all* coal- and coke-boats and barges, as provided by Section 1 of this act."

Section *3* amends and re-enacts Section 8 of the act referred to so as to read:

"No boat-*load* of coal or coke, *nor any part thereof*, shall be delivered to the purchaser, *whether the sale thereof was made within or without the State*,

until it has been *inspected* as provided in the act. And any person, partnership, firm or corporation who shall sell or deliver in this State a boat-*load* or a barge-*load* of coal or coke, *or any part thereof*, that has not been *gauged* as herein provided, *or who within twenty-four hours after the arrival in this State of any boat or barge loaded with coal or coke, shall not have notified said coal gaugers, or either of them, at their offices in the City of New Orleans, of its arrival in this State, requesting that the same be gauged as aforesaid, shall be liable to a penalty of fifty dollars* ($50) for each boat or barge of coal or coke, or *part thereof*, sold or delivered, and *for each boat or barge so arriving in this State of which no notice was given to the said coal gaugers*, to be recovered, with costs of suit, in any court of competent jurisdiction for the benefit of the Charity Hospital of the City of New Orleans."

It was by Section 4 enacted that this act take effect from and after its passage, and that all laws and parts of laws in conflict or inconsistent therewith be repealed.

IV.

In their answer, paragraph 13, page 23, the defendants deny that they will gauge any other coal than such as may be sold or intended by complainant for sale to others in the State of Louisiana, whereby they seem to admit, as is correct, the want of right to gauge coal intended for *consumption* by complainant in the course of its business. (See pa. 6, p. 3, of bill.)

Wilmot, manager for complainant in Louisiana, places the amount so annually consumed at from fifteen to twenty boat-loads (p. 76).

The defendants in their answer aver *their purpose* to gauge and continue to gauge *all* coal of complainant *arriving in the State* for sale or delivery (p. 21, par. 8; p. 23, p. 13), and in his evidence Rock, gauger, says that the gaugers gauge any (every) boat that comes down here (p. 113). They gauge but do not *weigh* (pp. 108, 110).

The text of the Act of 1904 requires notice to the gaugers within twenty-four hours *of the arrival of the coal within the State,* and it is sworn by Rock that, on receipt of such notice, the gaugers, one or both, meet the coming fleet as near its entry to the State as may be, or, as Rock says, "before we think they will break up the tow" (p. 102).

The complainant designates, by number or otherwise, the boats of the fleet which it wishes to have gauged, meaning those sold or to be sold as boat- or barge-*loads,* and according to the State gauge measurement. (Whann, pp, 67, 68; document, p. 116.) It will be seen that the place and time fixed by the Act of 1904 for and the actual gauging of the coal are while the coal is yet *in transit,* before it reaches the consignee, and, therefore, before it has ceased to be an article of *interstate* commerce, and while yet subject solely to Federal control.

Mr. Theiss, president of complainant company, describe its methods in Louisiana (p. 32). A large amount is sold and delivered to railroads, F. O. B. cars on the tracks of the railroads so purchasing, and by the ton, based on the weights of the scales of the railroad company purchasing. A large percentage is sold to the

steamship trade as "bunker" coal. It is delivered on the ship, trimmed in the bunkers and sold by the ton. Other sales are in the sugar or rice planters' trade, and delivery is made from the boat or barge to planters on the banks of the river.

The sales in *this* sugar and rice planters' trade are *by the barrel*, and where a *full* boat is sold settlement is made with the purchaser according to the *gauge* measure. When in smaller quantities settlement is sometimes by gauge measure, by having the boat re-gauged, and sometimes by tallying the wheelbarrowloads as the coal is unloaded from the boat to the bank.

Coal sold to dealers for resale is sold by the boat-*load* and settled for by gauge measure.

Where sold by the ton 2,000 pounds constitute a ton, or if by the barrel there is a slight variation in weight, according to grade. In the domestic trade the barrel is usually computed at 180 pounds.

For the thirteen months ending October 31, 1900, complainant's sales in Louisiana were 528 *unbroken* boatloads, 357 of which were in the plantation trade.

The ordinary sales (not plantation trade) for the year ending October 31, 1901, were 167 unbroken packages, and in the plantation trade 319. The ordinary yearly trade thereafter varied from 139 to 258 *unbroken packages*. In the plantation trade the yearly sales from November 1, 1901, to November 1, 1907, were, respectively, 76,104, 33, 32, 13 and 25 unbroken packages, while the coal sold from *broken* packages during the same years was the equiva-

lent of, respectively, 722, 647, 293, 528, 608, 374 boat-loads, and from November 1, 1907, to May 1, 1908, only two *unbroken* packages were sold in the plantation trade (p. 33).

Wilmot, complainant's manager in Louisiana, states (p. 75) that, roughly speaking, four-fifths of the company's coal is sold in broken packages; what contracts it has to fill, say in lots of 200 or 300 tons, the coal is taken from its boats, and in such *peddling* the gaugers' certificates are of no use; that the steamship and railroad company trade amounts to 400,000 or 500,000 tons of coal—*i. e.*, the equivalent of 400 to 500 boat-loads annually.

> "I sell coal to steamboats. * * * We take the coal out of these original packages. It is loaded on lighters, which are taken alongside the steamboat, and the quantity required is delivered by means of boxes holding say 180 pounds of coal" (p. 76).

Wood, a selling agent, states that he sold during the six months preceding June, 1908, say 80,000 to 100,000 tons of coal, only two barge-*loads* thereof in unbroken packages (p. 72).

The coal he sells to railroads is delivered on the cars of the railroad company in quantities as ordered, and is sold by the ton and weighed by such company on its own scales. The gauger's certificates perform no office whatsoever in such sales (p. 71).

Whann, a selling agent, says (p. 56) that before the discovery of fuel oil all the planters used coal; since such discovery they use oil (p. 56).

Schneidau, also a selling agent, and *Whann* conduct the domestic or local trade of complainant—that is, the sales for household, factory consumption and the like in the city, delivering from coalyards or depositories established for convenience in different parts of the city by means of carts, and by weight or barrel, without reference to the quantity of coal in the packages whose contents had been previously unloaded into such coal yards.

Whann's sales have been the equivalent of from 180 to 350 full packages for years, but of these packages only fifteen or twenty per year have been unbroken (pp. 58, 59).

Schneidau sells for the use of steamships of the Southern Pacific Railroad an annual equivalent of sixty to seventy-five coalboat *loads*. The steamship orders so many tons, naming them, of coal; a coalboat is taken alongside and as much of the coal as is called for is delivered on board by wheelbarrows or machinery, and is weighed as it is put on board (pp. 45, 46).

Schneidau says (p. 48):

> "We take a boat and go to one ship and put 200 tons on board of that ship, and then come back and go to another steamship and put fifty tons on that ship, and come back and give somebody else forty tons, and then another person 150 tons, etc."

The gaugers' certificates for the purpose of such sales serve no purpose (p. 46).

The only coal witness sells in unbroken boat-loads is to the United Fruit Company—say sixty to seventy-five

boats annually. All his other sales are from *broken* packages (pp. 44, 45).

(P. 75.) The coal of complainant arriving at its destination in Louisiana is held for sale at the following five (5) places, all on the lower Mississippi: Nine-Mile Point and Coal Port (on the west bank opposite the upper limits of New Orleans), Willow Grove (on the east bank and within city limits), Donaldsonville (eighty miles), Baton Rouge (say 120 miles), and Bayou Sara (say 140 miles above the city), all on the Mississippi River, the nearest of them several hundred miles from where the coal enters the State.

All these places are readily accessible from New Orleans by river or rail.

As a fact, coal arriving from Alabama by river or rail has never, so far as shown, been subjected to gauging, though it amounts to upwards of a million tons per annum. (Walshe, p. 85; Wood, p. 72; Rock, p. 113 *et seq.)*

It will be observed that the Act of 1888 on its face applies only to boat- and barge-*loads*. The Supreme Court of Louisiana dealt in 1889 with an alleged violation of the act in the selling of a *boat-load* or *unbroken package*.

But then, as now, it would appear that the gaugers interpreted the law of 1888 as compelling acceptance of their services, whether the contents of the boat were to be sold as a whole or were to be doled out by the barrel or ton, and irrespective of the total contents of such boat.

Therefore, on application by the coal company for a rehearing in the case of *State vs. Pittsburg and Southern*

Coal Company, 41 An. 466, 473, while refusing the rehearing, the Court said (p. 473):

> "Nothing shakes our conviction of the correctness of our interpretation of the statute as making the gauging of coalboats and barges before sale compulsory. *We may remark, however, that the act applies exclusively to sales of boat-*LOADS *or barge-*LOADS of coal, and not to sales of a particular number of barrels of coal from a boat or barge."

This opinion was rendered in May, 1889. The coal company, not satisfied with the conclusions in other respects of the State Supreme Court by writ of error took the case to this Court. (*Pittsburg & Southern Coal Company vs. Louisiana*, 156 U. S., 590.) In the statement of facts therein (p. 595) the means, manner and course of transportation of coal from Pittsburg to Louisiana is shown to be similar to that still in practice by appellee; but, and in this respect is the *wholly important difference* between the case as made up then and the case now pending—in that case the coal company sold its coal "to dealers, planters and other purchasers, *but in no quantity less than a boat- or barge-load.*"

Appellant assigned as one of the grounds for advancing the hearing of the present cause (see pp. 4 and 5 of their application therefor) that

> "the merits of the controversy have been once adjudicated by this Court in *Pittsburg & Southern Coal Company vs. Louisiana*, 156 U. S. 590, wherein the constitutional questions set up in the bill of complaint herein have been disposed of and decided adversely to complainant's claim."

This is *manifestly* erroneous, for the present complaint is not based on the want of constitutional right of the State of Louisiana to make and enforce inspection laws relative to the gauging of coal *in boat-loads*, where the gauging can serve the purpose of facilitating transactions and protect the purchaser, or to make and enforce proper laws under the State's police powers, *after the property has ceased to be property in transit* and has arrived at its destination within the State.

But valid inspection laws and other valid laws under the police power of the State must serve some useful or protective purpose, and such purpose is not served by compelling complainant to submit his coal to be gauged to ascertain the total number of barrels in the boats when brought into the State, when it is so brought in to be sold or disposed of by retail, by weight or measure, to which the measurement of the original total contents can have no relation.

A boatload of coal may be sold to a dozen or a hundred persons, to each as he may need—so many barrels, and the coal is separated from the mass in the boat as delivery is made. The steamship and steamboat trade requires so many *boxes or tons* of coal, and the coalboat, or a lighter to which the coal has been transferred from the original coalboat, goes alongside the vessel and delivers on board, tallying the coal or measuring it, or it is weighed as delivered. The *railroad* notifies complainant that it requires five or twenty, or other number of

carloads of coal; the cars are loaded and the contents then weighed by the railroad company.

Surely it does not facilitate such transactions or protect the purchaser, or serve the public, or even furnish statistics, to *gauge* the boat- or barge-*load* on its arrival, whether at the borders of the State or after it has been delivered at its destination within the State.

As already shown, the Supreme Court of Louisiana, in interpreting the statute of the State (1888) found that it did not apply to *coal* except when to be sold or disposed of by the boat- or barge-*load*.

Its interpretation will, we submit, be accepted in this Court.

But it was not satisfactory to parties in interest as gaugers to abide by such interpretation, and to avoid it there was passed and approved the abortive Act of 1894, amended by the Act of 1902, "to compel the weighing or gauging in the State of *all* bituminous or anthracite coal or coke sold in Louisiana by boat, barge or carload," and imposing a fine of not less than $50 or more than $100 at the discretion of the Court for each offense, meaning no doubt by "offense" the selling of a boat- or barge-*load*, not gauged or weighed. But even these acts were deemed insufficiently explicit to compel the gauging of coal and coke to be disposed of by retail or in quantities less than a boat-load.

Finally, the Act of 1904, amendatory of that of 1888, as enacted, purporting to make it the duty of the gaugers to gauge *all* boats or barges containing coal or coke

brought into the State of Louisiana for sale, or for delivery *under sales made out of the State;* and making it an offense punishable with fine to deliver to the purchaser, whether made under sale made within or outside the State, "a boat-load or barge-load of coal or coke, or *any part thereof*, that had not been gauged under the law," also making it an offense *not to give notice within twenty-four hours after the arrival in this State* of any coalboat or barge loaded with coal or coke to the coal gaugers, at their office in New Orleans, *of its arrival in this State*, and requesting that the same be gauged.

The act on its face was intended to apply to the shipment of coal even at the borders of the State while yet *in transit*, while the coal was still an article of interstate commerce, and before it has become, by delivery, commingled with the property of the State.

If there were needed authority to support the proposition that such property so conditioned is not subject to the inspection laws or the police powers of the State we might cite the case of the *Coal Company vs. Sheriff*, 40 La. An., wherein the Supreme Court of Louisiana said (p. 228):

> "A review of the constitutional articles invoked and of the whole jurisprudence on the subject and mature consideration of the recent rulings just mentioned force upon the mind the irresistible conclusion that by 'goods *in transit*' protected from all State and municipal taxation is meant goods moving from one State to another, although delayed in transporta-

> tion, and that such goods become lawful objects of such taxation the moment they reach their destination and are there *kept ready and offered for sale* at any point within the *place of destination.*"

The gaugers seek to reach the coal fleets as soon after they pass the State line as possible, in order, they say, to do the act of gauging "*before the tows are scattered*" (pp. 102, 110, 111).

> See, also, *Rhodes vs. Iowa*, 170 U. S. 412; *Bowman vs. Railroad Co.*, 125 U. S. 485; *Coe vs. Errol*, 116 U. S. 517; *Pabst Brewing Co. vs. Crenshaw*, 198 U. S. 23, 44.

So that it would seem, as we submit should be held, that the Act of 1904 is invalid even because it undertakes to operate upon property *in transit*, still undelivered to the consignee, still unmingled with the property of the State, and still subject to the protection of the constitution and the laws regulating commerce among the several States.

Whether this proposition admits of doubt, or whether the Act of 1904 be not held invalid upon the ground last stated, we further submit that the Acts of 1888, 1902 and 1904, so far as they require the gauging of coal brought to the State, or into the State, from another State, which coal is to be sold or disposed of otherwise than by boat- or barge-load, or aliquot parts thereof, are invalid as inspection laws, being useless, placing unnecessary burdens upon commerce among the States, and imposing unjust taxation, amounting to a taking of property without due process of law.

The testimony in the record and common observation can leave, we submit, no reasonable doubt that the gauging of coalboat *loads* or coalboats *loaded* can in no earthly way benefit, protect or serve the seller or buyer of *some* of that coal (not an aliquot part of such load), by weight or measure, which must, practically, and can, be ascertained only at the time of delivery, nor can such gauging or inspection serve the public or State.

To be valid as an inspection law or as a law under the police power of the State, we repeat, some useful or reasonable purpose must be effected. By illustration: It must protect the community, so far as it applies to domestic sales, from frauds and impositions. *(Clintsman vs. Arthropp,* 8 Cowan [N. Y.] 146.) Such laws pertain to the examination of certain articles so that they may be declared fit for commerce, or of merchandise intended for sale, especially food, with a view to ascertaining its fitness for use. (Bouvier's Law Dictionary, *verbo* Inspection Laws.) A purpose is

> "to improve the qualities of articles produced by the labor of the country, or fit them for exportation, or it may be for domestic use."
>
> *Gibbons vs. Ogden,* 9 Wheat; *Patapsco Guano Co. vs. Board, etc.,* 171 U. S. 354; *Turner vs. Maryland,* 107 U. S. 55.

The sole *legitimate* purpose of the several statutes of Louisiana in question was to establish the *quantity,* not quality, of coal in the *unbroken package* or *aliquot part thereof,* where fractional part was to be sold—this as be-

tween seller and purchaser, for no one else could be benefited or served by the prescribed inspection, and not even the purchaser of a part of a package not an aliquot part thereof could have possible valuable service or protection thereby.

This was the view of his Honor of the Court below (see transcript of appeal, p. 125):

> "To make the inspection statute apply to boatloads or barge-loads which are not sold in their entirety, but which are to be retailed to numerous purchasers, would protect no one and would accomplish no purpose that I can see. * * *
>
> " * * * None of these purchasers would receive any possible benefit from the fact that the entire barge-load had been inspected when the barge entered the State of Louisiana and its entire contents were there determined. * * *
>
> " * * * The weighing ('or measuring') by such individual purchaser has no sort of relation to the inspection of the entire load."

And from the acts themselves, as that of 1904, Section 8, declaring that "no boatload of coal or coke, nor *any part thereof*, shall be delivered to the purchaser," and the words in the sentence following, "and any persons, partnership, firm or corporation who shall deliver in this State a boatload or a barge-load of coal or coke, or *any part thereof*," his Honor determined, as by complainant contended (p. 124), that by "*part*" was meant by the legislator "some definite fraction of a boatload"—"an aliquot fraction of a load," and, therefore, granted the relief prayed for (p. 126).

It is most respectfully submitted that his Honor's conclusion was correct.

That conclusion involves the construction of the State law only; the Court neither considered nor decided any of the Federal questions raised by the bill,

Finally, the questions one or all, as we apprehend them, to be determined, are:

First. Whether or not his Honor of the Circuit Court properly construed the phrase "*any part thereof,*" as used in Acts of 1902 and 1904, to mean a *fractional* or aliquot part of a boat- or barge-*load.*

Second. Whether or not the Act of 1904, requiring the gauging of *all* coal *within State limits,* but before reaching its destination, and, therefore, while yet *in transit,* and yet an article of interstate commerce, is a valid inspection law or law in the valid exercise of the police powers of the State, under the commerce clause of the Constitution of the United States.

Third. Whether or not, it being conceded that the General Assembly may, by proper legislation, require the inspection and gauging of all boat- and barge-loads of coal arriving at their destination in the State, which are to be sold or disposed of as unbroken packages, it can be held that the acts either of 1888, 1902 or 1904, in question, do lawfully require the gauging of those boat- or barge-loads, whose contents are to be sold or disposed of by retail, by weight or measure, having no relation to the total contents of the full package or the fractional parts thereof.

Mugler vs. Kansas, 123 U. S. 661.

We submit that the construction of the powers of the gaugers, for which appellants contend, would render the acts under which they are appointed in violation of the commerce clause of the Constitution and deprive the complainant of his property without due process of law, and that the decree appealed from should be affirmed.

Respectfully,

Chas. S. Rice,
Of Counsel for Appellee

tion of the Federal Constitution is involved, and a direct appeal to this court from the Circuit Court will not lie under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826.

THE appellants are gaugers of coal and coke, appointed by the State of Louisiana. The appellee is a corporation organized under the laws of Pennsylvania, engaged in mining bituminous coal outside the State of Louisiana and transporting it to that and other States for sale. The transportation to Louisiana is in coal boats or barges. For some years the sales were largely in bulk by the boat or barge load, but within a year or two prior to the commencement of this suit, in consequence of the introduction and general use of fuel oil, the sale in boat or barge loads had been reduced to some thirty-five or forty loads per annum, although the appellee was transporting to Louisiana from 800 to 1,000 loaded boats and barges. By far the bulk of the sales were thus by barrel or weight and not by boat or barge load, and the amount of each sale was fixed and determined by actual measurement or weighing at the time of delivery to the purchaser.

An act was passed by the State of Louisiana, in 1888, in respect to gauging. Laws 1888, p. 207, chap. 147. The validity of this statute was challenged in the state courts, but sustained by the Supreme Court. *State* v. *Pittsburg & Southern Coal Company*, 41 La. Ann. 465. That court, refusing a rehearing, said (p. 473):

"Nothing in this application shakes our conviction of the correctness of our interpretation of the statute as making the gauging of the coalboats and barges, before sale, compulsory. We may remark, however, that the act applies exclusively to sales of boat loads or barge loads of coal, and not to sales of a particular number of barrels of coal from a boat or barge."

The case was brought to this court and the ruling of the Supreme Court of Louisiana sustained, it appearing that the sales were "to dealers, planters, and other purchasers, but in no quantity less than a boat or barge load." Subsequent leg-

islation was had in Louisiana. Acts 1894, page 172, Act 137; Acts 1902, page 81, being an amendment of the act of 1894, and Acts 1904, page 201, an amendment of the act of 1888. The only difference between the later legislation and the act of 1888 which is material is that in the act of 1888, § 8, it is provided "no boat load of coal or coke shall be sold in this city or State until it has been inspected, as provided for by this act," while § 3 of the act of 1904 reads, "no boat load of coal or coke, nor any part thereof, shall be delivered to the purchaser thereof, whether the sale was made within or without the State, until it has been inspected as provided for in this act."

On December 10, 1906, the appellee filed its bill in the Circuit Court of the United States for the Eastern District of Louisiana to restrain the gaugers of coal from proceeding under the acts except as to coal sold or intended for sale by boat or barge load. On June 11, 1908, a decree was entered for the plaintiff, in accordance with the prayer of the bill, the court in its opinion saying:

"The title of the act of 1902, and of the act of 1904, is 'An act to compel the weighing or gauging in the State of all bituminous or anthracite coal or coke sold in Louisiana by boat, barge or car load.' The act of 1904, sec. 8, reads, 'No boat load of coal or coke, nor any part thereof, shall be delivered to the purchaser,' and in the next sentence reads, 'And any person, partnership, firm or corporation who shall sell or deliver in this State a boat load or a barge load of coal or coke, or any part thereof.' Construing the word part with reference to the object of the statute and with reference to the words that immediately precede it, I do not see how there can be any doubt that the part meant is an aliquot fraction of a load."

From this decree of the Circuit Court the appellants appealed directly to this court.

Mr. E. Howard McCaleb, Junior, with whom *Mr. Walter Guion* was on the brief, for appellants.

Mr. Charles S. Rice, for appellee.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

An appeal was taken under § 5 of the act creating the Circuit Court of Appeals. 26 Stat. 826, 827. The mere construction of a state statute does not of itself present a Federal question. But the contention of appellants is that the Circuit Court improperly construed the act of 1904; that correctly construed it applies not merely to sales by boat or barge load, or some aliquot part thereof, but also to sales by weight or measurement, and that under such construction a question is presented of a conflict between it and the Federal Constitution.

But the difficulty with this contention is, first, that the statute construed as applied to boat and barge loads has been declared valid by this court; and further, that there is no claim by the appellee of any invalidity in the statute, but only of its inapplicability to the facts. In the face of the decision of this court and the claim of the appellee it is difficult to see how there can be any question of a conflict between the legislation and the Federal Constitution. After a final decision, it is going too far to hold that there still remains an undecided question, and that when we have held that a statute of a State is valid there remains a controversy as to its validity, and this is emphatically true when neither party challenges that decision. Nor for like reason does there appear any ground for holding that there is a question as to the construction or application of the Constitution. While in § 10 of Art. I of the Federal Constitution there is a recognition of the power of the State to pass inspection laws, yet to justify a holding that the application of the Federal Constitution is involved there should be a question as to the relation between some constitutional provision and the state statute.

Under these circumstances we are of opinion that this court has no jurisdiction, and the appeal must be

Dismissed.

OPINION

KNOP *v.* MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 449. Argued December 18, 1908.—Decided January 4, 1909.

The mere construction of a state statute does not of itself present a Federal question.

Where the constitutionality of a state statute, as construed by the highest court of the State, is admitted, and only its applicability to the facts is denied, no question as to the construction or applica-